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MINNESOTA REPORTS

VOL. 144

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

OCTOBER 24, 1919—JANUARY 16, 1920

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**SECRETARY OF THE STATE OF MINNESOTA IN TRUST FOR THE BENEFIT OF
THE PEOPLE OF SAID STATE**

(144 M.)

JUN 10 1921

**JUSTICES
OF
THE SUPREME COURT
OF MINNESOTA
DURING THE TIME OF THESE REPORTS**

**Hon. CALVIN L. BROWN, Chief Justice
Hon. ANDREW HOLT
Hon. OSCAR HALLAM
Hon. JAMES H. QUINN
Hon. HOMER B. DIBELL**

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NOTE

By G. S. 1913, § 137, the reporter is required to report all cases decided by the court.

Pursuant to G. S. 1913, § 123, the headnote in each case is prepared by the justice or commissioner writing the opinion, except where otherwise noted.

With a few exceptions the cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court.

As required by G. S. 1913, § 137, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.

In citations from the first twenty volumes of the Minnesota Reports the page of the original edition is given, preceded by the corresponding page of the edition by Chief Justice Gilfillan.

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BY ORDERS MADE IN OPEN COURT, THE OPINIONS
WRITTEN BY THE COMMISSIONERS AND REPORTED IN
THIS VOLUME WERE ADOPTED AS THE OPINIONS OF
THE COURT BEFORE THEY WERE FILED, AND HAVE
THE SAME FORCE AND EFFECT AS THOUGH WRITTEN
BY A JUSTICE OF THE COURT.

FOR TABLE OF STATUTES CITED BY THE COURT
SEE INDEX, PAGES 575-578.

PROCEEDINGS
IN MEMORY OF
FORMER CHIEF JUSTICE START

On the morning of April 30, 1920, in the court room at the State Capitol, CHIEF JUSTICE BROWN presiding, the following memorial of FORMER CHIEF JUSTICE START was presented to the court and read by Chester L. Caldwell, Esq.

MEMORIAL

CHARLES MONROE START, CHIEF JUSTICE OF THE SUPREME COURT of the state of Minnesota, from January, 1895, until January, 1913, died at his home in St. Paul, December 19, 1919.

Judge Start was born at Bakersfield, Vermont, October 4, 1839. He was of New England ancestry, and throughout his entire life exemplified the best qualities of that people, for he was simple in taste, frugal and temperate in his habits of life, and, while stern and unyielding in his sense of right and wrong, his predominating characteristic was a sense of justice and an inflexible determination to deal justly with all those with whom he came in contact.

To be just in the determination of individual rights is much more difficult than to be honest. The ordinary man is honest and naturally well disposed, but he is often saturated with prejudices and is a victim of environment, and in attempting to adjudicate upon individual rights he is hampered by the mental bias he has acquired from his associations and habits of life.

He who can overcome these human tendencies and look upon each individual as a being, endowed by his Creator with rights equal before the law to those of every other citizen, and fearlessly protect those rights, has reached the pinnacle of juridical integrity, without regard to the concrete correctness of any particular decision which he may render.

If this test be applied to Judge Start, it will show him to have been one of the really great men of his generation.

His early life was that of the ordinary Vermont farmer's son, helping his parents to secure a scanty sustenance from a rocky soil. Later, when he entered Barre Academy, his vacations were spent in earning sufficient to keep him at school; and when he entered the office of his preceptor in the law, Judge William C. Wilson of Vermont, he earned his board in Judge Wilson's family by the performance of those chores which were considered a necessary part of a Vermont boy's education. This period of apprenticeship was not without its romance, for he subsequently married his preceptor's daughter, Miss Clara A. Wilson, who continued, throughout his long life, to be his devoted helpmeet.

No higher tribute could be paid to the character of this lady than was expressed in the chivalrous attitude which Judge Start always maintained towards women.

It was typical of him that he should enlist as a private in the Union Army, which he did in 1862, as a member of Company I, of the Tenth Vermont Volunteers, and as was naturally to be expected, his character and talent earned him a commission the following month. Shortly afterward he was compelled to resign because of disability and next we find him in Minnesota in 1863 entering upon the practice of law at Rochester.

In the state of his adoption, his integrity, ability and devotion to duty have always been recognized by his fellow citizens. Thus he was prosecuting attorney for Olmsted county for eight years; attorney general of Minnesota from January 1, 1880 until March 12, 1881; judge of the Third judicial district from 1881 until 1895; and Chief Justice of the state from 1895 until he voluntarily retired in January, 1913. His opinions appear in sixty-one of our reports: Volumes 60 to 120 inclusive; they are models of clearness, showing close application and deep research and indicate a simple and direct honesty and devotion to the fundamental principles of our system of government, rather than any desire to individualize himself or to secure a reputation by the expression of sensational views.

The high regard in which he was held by the bar of the Third judicial district is shown by the fact that when he presided, three jury trials in civil cases were the exception.

Judge Start believed in human progress, and was alert to sustain legitimate progressive legislation, but he believed that such legislation

should be a matter of gradual development, realizing as he did the danger of sudden revolutionary changes.

A memorandum, in his own hand-writing, found amongst his papers after his death illustrates his attitude:

“A reform movement ought not be sent straight to the mark, like a cannon ball, without regard to the wreck and ruin which may follow. It should be strenuous, but fair; persistent, but deliberate; it should be based upon justice and controlled by reason, for no permanent reform can, or ought to be, secured in any other way.”

Only those who knew him intimately knew how kind and sympathetic were his mind and heart. In his opinions he avoided, as far as possible, harsh statements, and advised against any unnecessary reflections on counsel practicing before the court. “Perhaps,” he said upon one occasion, “some statement which we make while smarting under the discourtesy of a practitioner, may in future years cause grief or embarrassment to some innocent child.”

His attitude upon public questions was always that of the sincere and patriotic American; after the Spanish War he delivered an address at Rochester before Custer Post G. A. R. in which he said:

“Since the victory of Manila, we have suggestions from influential sources, that we must permanently hold the Philippine Islands, and enter upon a career of colonization and imperialism, and become a potent factor in the political factors of the world.”

“This is to be deprecated. Let us remember that when we entered upon this war, the national honor was pledged that it was not for the purpose of conquest, nor the acquisition of more territory, and that it will be an act of national perfidy not to keep that pledge. Also that our nation is a union of sovereign and equal states, with no place for dependent colonies.”

Every quality of good citizenship so necessary to America at this time of unrest was possessed by Judge Start. He was devoted, heart and soul, to the American system of government; he was invincible in honesty, devoted to the public service, an uncompromising champion of individual liberty. He realized that law is necessarily a progressive science, but had reverence for, and held fast to all that was good in the past. He respected authority, but hated arbitrary power and had so developed

and trained the natural impulses of his character, that he was an ideal officer of justice.

BURT W. EATON, Chairman.
THOMAS D. O'BRIEN,
DAVID F. SIMPSON,
L. L. COLLINS,
HAROLD J. RICHARDSON,
VICTOR STEARNS,
CHESTER L. CALDWELL,
Committee.

St. Paul, April 30, 1920.

BUNN W. WILLSON, ESQ., then addressed the court and read the following eulogy, prepared by his father, HONORABLE CHARLES C. WILLSON:

HONORABLE CHARLES MONROE START was born October 4, 1839, at Bakersfield, Vermont. His father, Simeon Gould Start and his mother, Mary Sophia (Barnes) Start, were also natives of that state. His father was a farmer by occupation, and was justice of the peace in his township, for twenty-five years. From his farm and the assistance of his children he made a humble livelihood. His son Charles worked as a farm laborer summers and taught country school winters, and in that manner obtained the necessary means to defray his expenses in securing an education.

In July, 1862, he enlisted as a private in Company I of Tenth Vermont Infantry. In the following August he was commissioned first lieutenant and went with his regiment to Virginia, but in December of that year he resigned from the service on a surgeon's certificate of physical disability. The next summer, 1863, he came to Rochester, Minnesota, and entered my law office as a student to learn the Minnesota practice. He had previously studied law in the office of Honorable William C. Wilson at Bakersfield, Vermont. On August 10, 1865, he married Miss Clara A. Wilson, a daughter of the judge in whose office he had read Blackstone.

In the spring of 1864 he was elected city attorney of Rochester, Minnesota, and held that office several years. In November, 1871, he was elected

county attorney of Olmsted county, Minnesota, and held that office eight years. In November, 1879, he was elected attorney general of this state. In March, 1881, Judge William Mitchell of the Third judicial district of this state was appointed one of the justices of the Supreme Court, and Governor Pillsbury appointed Mr. Start judge of the district court in the place of Judge Mitchell. Judge Start held that office by successive elections until January 7, 1895. In the preceding November he was elected Chief Justice of this state and held that office by successive elections until January 6, 1913.

Justice Start was slightly under medium height, but of quick and vigorous action, and of untiring industry. He had unusual self-control and never permitted himself to indulge in disparaging remarks concerning anyone. His self-control in this regard and his unfailing cordiality kept him in office nearly all the first fifty years of his residence in this state. As judge of the district court he was well esteemed and had the confidence and good opinion of everyone. He was upright, and impartial between high and low, rich and poor, frugal in expense and entirely void of ostentation.

The story of Justice Start's life should stimulate the youth of the country to imitate his rugged, untiring industry and his unswerving purpose to acquire an education and a position of usefulness and honor. Proud and grateful should every youth of our country be, that he is a citizen and member of this republic where the humblest can attain any position of trust and honor of which he is capable. The obligations of this citizenship are paramount to every other duty. To the members of the legal profession they especially appeal.

Justice Start's purity of life and devotion to duty exhibited the great benefits and concurrent obligations which membership in the American republic imposes. If we look around among the prosperous and successful men of our acquaintance we find that nearly all came up from humble and obscure origin. From such origin Chief Justice Start rose to the highest judicial honor in the gift of his fellow countrymen.

In Continental Europe feudalism, more or less modified, still obtains. The eldest son in succession from a remote conquering ancestor, holds, by entail, title to land, and exacts rent and military service from his tenants.

The land is not taxed or assessed directly in any way. Rent, income taxes, licenses and tariffs on imports are the chief sources of revenue. Many of the uneducated children of these servile tenants find their way to America and are prone here to regard with aversion anyone having wealth or position, as their fathers regarded the landowners of their native country.

To stem this disloyal tendency of some of the newcomers, Justice Start's voice and example were never wanting. He was ever ready to uphold and honor the Stars and Stripes, the emblem of his country. In youth he marched under arms beneath its folds and in mature manhood he invested his earnings in his country's securities and gave his voice in its loyal support. In what other country could his successive honors have been acquired? It is to be regretted that there are here a few ungrateful sons born to such great opportunities who give their voice and effort, plausible and insidious, to that socialism that would overthrow this republic and bring ruin, riot and misfortune in the place of present prosperity and happiness. If such a man there be in the legal profession, let him repent and take Chief Justice Start for his example, or unrepentant be disbarred. He is unworthy to speak in this honorable court. Let him go down

"To the vile dust from whence he sprung,
Unwept, unhonored and unsung."

HONORABLE THOMAS S. BUCKHAM then addressed the court and said:

May it please this court:

I hardly know upon what ground a man who has been so long divorced from all connection with the courts of the state as I have should be entitled on such an occasion as this to take part in the program of the day. My only excuse for being here at all is the fact of my long acquaintance, my somewhat intimate acquaintance, with the late Chief Justice Start, and the suggestion of the present Chief Justice of this court that he considered it to be appropriate for me to say something on this occasion; a suggestion coming from such a source being to a member of the bar in the nature of a command.

I was very much pleased with the memorial presented by the committee.

I knew Mr. Start pretty well during his whole lifetime. I knew something of his ancestry and of his parents and of the men among whom he spent his early years, men who best represent the original settlers of New England, men who have no superiors the whole world over. He might well feel proud of his origin and his ancestry, and the committee did well to speak of him as a representative of the time-honored original New England Vermont stock.

I will not go except very briefly into any statement of the acquaintance which I had with Judge Start. I knew him when he first came to the state. I was the judge of a neighboring district, living at Faribault. I met him often, met him quite intimately, held court for him a number of times when he was cleaning up his work as a lawyer to take his seat on the bench. I never met him as a practicing lawyer in the trial of a cause, but he did try one or two cases before me just before his own appointment as a judge and the only remembrance that I carry of those cases was the extreme zeal and urgency with which he pleaded the cause of his clients. He was matched at that time against one of the leading lawyers of the state, the late Gordon E. Cole of Rice county, and I watched his trial of the cases with a good deal of interest on account of his Vermont origin.

I am not going to eulogize Judge Start as a lawyer and a judge. The memorial which was presented here states exactly what I should say if I could say it as well as that does. He was an able judge, he was an upright and honest judge, he was a very modest and unassuming citizen, a warm, cordial friend, one of those men whom it is a delight to remember. The mere fact that he was elected and re-elected in his own district and afterwards to the supreme bench of this state at a time when the selection of judges was left almost entirely to the action of the bar, when no man could presume to stand for an election who was not the choice of the bar, and no man could expect to be elected who was opposed by the bar, is sufficient proof that he was held in high esteem by the lawyers of the state and that he deserved the honors which were put upon him.

I think one of the most entertaining and one of the most instructive exercises on the part of a practicing lawyer who knows anything personally about the judge who writes an opinion, is to trace back that

opinion and the course of reasoning which it employs, to what he knows of the character and habits, mental and moral, of that judge; or if he does not know the judge, to build up a picture of him by the reading of his written opinions. That is the way the judge lives in the memory of the bar, through the opinions in which he was the spokesman of the court when personal memory of him wholly or partially fades away. I doubt not most of the lawyers here have forgotten the earlier judges of this court. They live in their memories only by tradition, Judge Emmett, Judge Flandrau, Judge Atwater, the first court before whom I had the honor to appear; and Judge Berry, Judge Wilson and Judge McMillan, the last judges whom I ever addressed, before today. But though we have lost memory of them personally we trace them in their reports.

Now I think that the opinions of Judge Start, which of course were in substance the opinions of the other judges of the court, and which I have read and carefully studied, for they often criticised the views which I had presented as a district judge, show just two characteristics on the part of Judge Start which have been so strongly dwelt upon in the memorial presented here, and in the remarks of Mr. Willson, namely, his unbending love of justice and his view of the duty of a supreme court judge in passing upon a case brought before him on appeal. And this is the impression that I always had of the man from his opinions apart from my knowledge of him and of his own statements. He never troubled himself with anything but the exact particular points that he was called upon to decide. He did not discuss the length and breadth and height and depth of the principles involved in the case itself. It was sufficient for him to decide the controversy in hand and decide it rightly. He did not consider it necessary to solve any future problems. He was content to let those questions take care of themselves when the time came. There was very much water to pass under the bridge before that time arrived. Possibly the bridge itself might be carried away and it might be necessary to find some other method of crossing the stream; but the present duty was to decide the instant case. He considered his duty done ordinarily with a case when he either directed that the successful litigant should proceed to put his judgment into execution or that he must go back and begin over again and try his case anew. I don't mean

to intimate for a moment that he could not exhaustively consider legal questions. I could refer to cases in our reports in which he has shown his ability to do that, but his object always was, and so he said, to see that the case he was examining, whether he would write the opinion or not, was so decided that absolute justice so far as it is possible for human beings to do it, should be rendered the parties.

He was a man who in his every action showed a strong, genuine sympathy with what has come to be called the average man, the man who without attempting, or thinking that he could if he did so attempt, to unravel the mysteries of the divine economy of the universe, wrestles manfully but blindly all his life with those great problems that Job and his friends so ineffectually discussed, who struggles through a lifetime unable to understand why so often the bad man flourishes like the green bay tree while the "good man's share in life was gall and bitterness of soul," but yet who keeps on with the struggle, does his duty as he best sees it to his community, to his country, to those of his own household, and finally passes on to that world, if it may be called a world, where he will doubtless be enlightened further—that is the man that Judge Start always spoke of with respect and feeling, and I was glad that the memorial which will be the record of this court, or part of it, of his life should make a strong point of that feature of his character.

I knew Judge Start quite well. I knew his family somewhat before he came to this state. They lived in the same county in Vermont where I resided as a boy. They were well known in that community and highly respected. When we both moved to this state and I came to know him personally, I admired him and had a strong personal affection for him. I looked upon his death as a personal loss outside of his loss as an honored citizen. After he came to St. Paul to live I did not see so much of him as I had in former years, but it has been a great pleasure even in this imperfect way to testify as a lawyer, as a neighboring judge, and as a personal friend, to my opinion of his ability, his character, his learning and his sterling integrity.

HONORABLE FRANK B. KELLOGG presented the following tribute to the memory of his former associate at the Rochester bar:

To the Honorable the Chief Justice, Associate Justices and Commissioners of the Supreme Court of Minnesota:

I am honored by your kind invitation to pay my humble tribute to the life and character of the late Chief Justice. It was my good fortune to know Judge Start intimately for 45 years. When I went to Rochester from the farm in 1875 to study law, he was one of the first men whose acquaintance I made, and from that time until his death, he was to me, as to many others, a kind friend and a wise and able counsellor, and I know of no one who needs encouragement, advice and assistance more than the young lawyer.

Judge Start was of English descent. He came from that virile, self-reliant New England stock. He was born and reared in Vermont, educated in the schools and colleges of Vermont, and started his profession in the Green Mountain state. He enlisted in the army as a private in the great Rebellion which threatened the destruction of the Union, was promoted to lieutenant, and after serving about six months, was compelled to relinquish his commission because of ill health. He came to Minnesota in October, 1863, and settled at Rochester. He was one of those vigorous, forward-looking, able young men who came, in the early days, to the Great West—a land of surpassing richness and unequalled opportunity—there to lay the foundation of his future career. The next half century that followed in the development of this country and the world were the most important ever recorded in history. Never was there such progress and advancement in science, art, invention, increase of wealth, production and commerce as during this period. He took his place among the able, progressive men of his day. At the bar, as city attorney of Rochester, county attorney of Olmsted county, attorney general of his state, judge of the district court and Chief Justice of this supreme tribunal, he met the expectations of friends and the public. He was a thoroughly educated and profound lawyer, a patriotic, liberty-loving citizen, and a just judge. He had the attributes necessary to success—untiring energy, fixedness of purpose and devotion to duty. His most pronounced characteristics were patriotism, a thorough understand-

ing of the duties of citizenship, and of the principles upon which rest the foundation of representative democracy. He was liberal in his political views. The champion of the weak and unfortunate, with an unshakable confidence in the wisdom of democratic institutions and in the destiny of his country. And yet he thoroughly believed in the conservative forces of law and those constitutional principles of the Bill of Rights, so essential to human liberty and happiness and the perpetuation of our institutions. He realized the importance of the purity and stability of the courts; that the lawyer is a great, conservative force in political life; that his study of the science of government, his respect for law and precedent make him so.

De Tocqueville once said that "when the American people is intoxicated by passion or carried away by the impetuosity of its ideas, it is checked and stopped by the almost invisible influence of its legal counsellors."¹

And yet the lawyer is not a reactionary. He has been a leader in all great movements for the development and advancement of representative government. He lends stability to these evolutionary forces, which sometimes stir people to unwise innovations. There never was a time in the history of the world when there was more need of these conservative forces of society than at present, if we are to preserve the principles of representative democracy. Of all governments which the wisdom of the ages has devised, ours is more nearly fitted to preserve liberty, encourage individual enterprise and promote the highest development of civilization. Our Constitution was not the inspired conception of a few men, but the evolutionary work of centuries of experience and struggles for self-government. It was bought by human sacrifice and sanctified by the blood of martyrs. Those great principles of our Constitution which constitute the foundation of human liberty and progressive nationalism cannot be lightly discarded. Freedom of speech, of religious belief, protection to the person, the right to pursue one's own vocation, to enjoy the fruits of individual energy and enterprise, permanency and stability of law, protection against the tyranny of government or the tyranny of the mob, integrity of the courts and all the other constitutional rights, are priceless heritages of a free people. There are today, in this land, as in other countries, revolutionary and disturbing forces at work. Great organiza-

¹[Democracy in America, C. XVI]

tions, largely of foreigners, teaching their doctrines of destruction and revolution—the Communists, Socialists, I. W. W., the Bolsheviks and others. These organizations and their propaganda must be uprooted and destroyed, the people must be educated in sound principles of government, the world must return to the pathways of peace and industry, or our twentieth century civilization will disappear as the Roman civilization disappeared over fifteen centuries ago.

While Judge Start's sympathies were with the great mass of the toiling millions of his countrymen, while he was quick to lend his influence to aid in those reforms necessary to human happiness, no man whom I ever knew had a more profound understanding of those conservative principles of government necessary to society than he. He was charitable to the weak and unfortunate, but strong and merciless in his prosecution of evil. Laws, in his judgment, were made for the benefit of society and to be obeyed. He did not believe that the principles of our constitutional form of government, with the guarantees of the Bill of Rights, were mere matters of expediency, to be cast aside in the changing tides of public opinion, and he looked with apprehension upon the wide-spread propaganda teaching the people of this country doctrines so foreign to our institutions. He believed that those principles were better safeguards to human liberty and happiness than the speculative philosophy and untried theories of agitators and political opportunists.

It is unnecessary for me to say that he had the greatest veneration for the judicial office. Political honors were often within his grasp, but he never swerved from his purpose to devote his life to the administration of the law. No one realized more than he that law is the embodiment of the highest ideals of civilization. It has governed the relations of men in the most primitive and savage state, and in the modern and highest developed society. Before history recorded and left to succeeding generations the deeds of men, law was the governing power and controlling influence of communities and nations. With the growth of government, the uplifting of physical and social conditions, law has been keeping pace with the march of progress. Its invisible forces dominate and control nations, man in all his relations in society, the tremendous transactions of modern economic life, and the minutest details of our social and industrial fabric. It is all-pervading and ever-present. With-

out it there is no government, no social order, no home. Its administration is the highest and noblest duty of man to his fellows. Its purity and stability are necessary to the peace, happiness and prosperity of peoples. Its corruption is the destruction of the state and of the nation. For more than a quarter of a century, Judge Start realizing these principles, labored to make them vital forces of society and government.

His career was long and honorable. With learning and ability, with patience and a belief in our institutions, he helped to write the judicial history of the state, and he left it as a legacy to his country. His last days were troubled by the great conflict which cast its shadow over the world, but through it all, he believed in the destiny of his country and that this government and all its institutions would be preserved for the benefit of the countless generations to come. It is fitting that we honor his memory and exalt the judicial office that they may both be perpetuated.

HONORABLE LORIN CRAY then addressed the court and said:

May it please the court:

I feel quite incompetent to speak of the virtues of our brother lawyer, Charles M. Start, late Chief Justice of this court.

As a man, a lawyer and a judge, he has attracted public attention in this and other states for many years, very generally commended, very seldom otherwise.

After years engaged in the successful practice of the law, in March, 1881, he assumed the duties of judge of the district court of the Third judicial district of this state, where he served with marked ability until January, 1895, when he was raised to the exalted position of Chief Justice of this court, which position he held with honor to both this court and to himself, until a short time before his death.

It was my good fortune to make the acquaintance of Judge Start as early as 1886, and in all sincerity I can say that I have highly prized that acquaintanceship, and the friendship that resulted from it, which grew stronger and more intimate as time passed by.

There is to the practitioner a comfort and satisfaction, that cannot be easily expressed, in knowing when approaching a forum, that if he have law and natural justice on his side, he is going to prevail, and in knowing, that although he may err in law or in its application, his cause

will be given all due consideration, and that his views, if candidly expressed, will be duly weighed. All this he could confidently expect from our deceased brother.

Judge Start, as a jurist, seemed by mere intuition to be able to grasp the salient points in a case, to solve intricate legal problems, to brush away technicalities, and take in the entire subject and determine how and where natural justice required that the law should be construed and applied.

Supremely honest in his convictions, courageous to a fault, his decisions, eminently satisfactory to one seeking after justice, must have been eminently satisfactory to himself as well, and to have met with the approval of his own conscience, which was a controlling factor in all of his acts, and which is the highest reward due to any man.

When he left us, he left a spotless record and an unsullied name, both as a jurist and a citizen. His taking away was a great and distinct loss to the law-loving people of our state. His life was an inspiration to all members of the bar who knew him well, and all they whose mentor he was, are the better because of having known him.

When a boy living in the country, I wrote to an able and quite noted lawyer in this state, asking the privilege of studying law in his office; my inquiry elicited no response. This lawyer was not Charles M. Start. Not he, who was always considerate of the young, kindly of heart, and courteous to a fault.

He loved his profession, and when in health his greatest pleasure was found in work at his desk, and among his books. The profession profited, and the bench was more highly honored, because of this.

He has passed from his labors to the other shore, and memories of his true worth close the book.

HONORABLE CHRISTOPHER D. O'BRIEN then addressed the court and said:

According to the traditions of the bar, this court assembles today to inscribe upon its records in enduring form, our recognition of a useful and well spent life—a life that was beneficial to this commonwealth and to our entire republic, the life of a citizen who, while among us, and

during all of his years, well and fully performed all of his duties to God and to his fellowmen.

It is well for us to contemplate such lives as these. It is well that they should be described by those who are living witnesses to their existence. It is well that such history should be preserved in the enduring records of this court for the benefit of generations yet to come.

The services of Justice Start to his country and fellow citizens began with his early manhood when he gave them to the Union cause in our Civil War. Upon its termination, he gave them to the people of this state through our profession, as county attorney, attorney general, district judge and Chief Justice of this court. For more than forty years he gave to his fellow citizens his services in these public positions, and in each of them all of his duties were fully, efficiently and honestly performed, with no thought of self-advancement, with no ambition other than the complete performance of the duties that arose, and with a full appreciation of his responsibility to his Creator and his fellow citizens.

I know of no profession save that of the ministry, which exacts more industry, fidelity and self-sacrifice from its members than does that of the law, and in that profession, there is no position more exacting than that of a judge. For a judge must surrender to the proper performance of his duties a large share of those associations and personal activities that form most of the comforts and attractions of life. He can have no intimate associations among the members of the bar, because that might create scandal. He cannot associate closely with the officers or managers of large corporate interests for a like reason, and socially he must be reserved and dignified to an unusual degree. It follows that the occupants of the bench are largely men who have selected that walk in life because of their desire and ambition to be useful to the community and to devote themselves to the welfare of their fellow citizens rather than to their own.

To pass upon the multitude of questions affecting the lives, liberties, properties and social conditions of their fellow citizens; to disentangle the intricate convolutions and entanglements of human life; to look through and behind the mass of misrepresentation, intentional or unintentional, that envelope all litigation; to see through them only the light of truth; to recognize and distinguish the "ignis fatuus" of self

interest, passion, cupidity, malice and falsehood that may be present in any cause, from the truth; to resolve the varying and contradictory representations of the litigants; to determine the effect of such representations upon the manifold human interests which cause their presentation; and, at the last, to resolve these controversies by the sole light of truth, reason and justice, present to the human mind one of the greatest problems which it can contemplate. Verily, the judge must bring to the performance of his high and complex duties, the best capacity, the best training and the best skill of which the human mind is capable, and this must be again controlled and reinforced by a spirit of justice, truth, charity and mercy, to entitle the conclusions of the court to the respect and obedience which just decisions deserve.

Not only are the mental difficulties almost beyond description, but if possible a judge must bring to the performance of his duties such physical equipment as will enable him to give to those duties his full mental capacity. And when it is reflected that hour by hour, day by day, month by month and year by year, the entire mental capacity of a judge must be given to the determination of causes which, though presenting all of the difficulties that have been hinted at, absolutely vary from each other, so that one instance is not an aid to the determination of the other cause, the duties of a judge and of a court become almost beyond the capacity of the human language to adequately describe.

It is, however, a great satisfaction to know that our citizens do recognize in the capable judge the qualities which enable him to fulfil the duties of his office. And though popular election is charged with many faults, insufficiencies and mistakes, our experience is, in this state at least, that the popular instinct rarely goes wrong, and that when the proper man has been found to accept the duties of such high office, whether in the district courts or in this court, the performance of those duties by him has been recognized by the electorate by constant and continual re-election during the time he may desire it. This is true as to a large majority of the members of our judiciary. It is particularly true in the case of Justice Start, who was continued in his high office of Chief Justice up to, and until the time when he felt the right to retire from the performance of his duties for the brief interval of rest and reflection which was allowed to him.

It is easy to indulge in high-toned sentiments. It is easy to couple together oratorical superlatives, and cast them lightly upon the grave of a man who has passed away. But a good, faithful and efficient man deserves more than that. He deserves the grave, studied and sincere expression of approval of those of his fellow citizens who know what his work has been, and how well it has been done. It is the work and the history of such a man that we commemorate today.

Of course we have among us, or have had among us, men of great brilliancy. I sometimes doubt if they are the most useful. A meteor comes from obscurity, casts its brilliant light around its pathway, and descends into darkness. It challenges our admiration, but not any permanent recollection. For my own part, I prefer the more lasting rays of the useful planets, who, while not so brilliant, are steadier and more effective, and whose light continues to illuminate the rugged pathways of human experience, even when they have gone to the most distant extremity of their orbit.

The beneficial effects of the services of Judge Start as Chief Justice of Minnesota, did not cease with his death. In the just and wise opinions formulated by him in this court, we find the proper methods as well as the proper directions for the administration among the citizens of this community, of proper and equitable rules, as well for the conduct of the citizens in their dealings with each other, as for the settlement of their varying contentions and disputes, and this court, and other courts of like character, will continue, as long as the republic endures, to reap the benefit of his judgment and opinions. To the practitioner, they will point the way to a serviceable, orderly and effectual performance of the duties of his profession. To the judges who succeed him they will show with what a just, equitable and clear mental apprehension he determined the causes brought before him. And so his services and influence will continue, particularly in this court, and with the bar of Minnesota for many, many years still to come.

Like Chief Justice Marshall, and Chancellor Kent, his determinations of the vexed questions of human affairs in all phases of life, will remain to be found for the benefit of our profession, and our citizenship at large. That all of his duties were well and completely fulfilled, those of his

profession who knew him in his lifetime, know full well. That his life was a high, virtuous, useful and beneficial life to his fellow citizens we stand here today to testify of our own knowledge and without fear of contradiction. That he is today in the receipt of the greatest reward that the soul of man is capable of receiving, we sincerely believe. And that he is now in the greatest of courts, in the presence of the greatest of judges, an eternal witness to the administration of those great laws which are perfect in their justice, as well as in their mercy, we confidently believe. And so, his life work done, and so well done, he rests in that eternal peace and happiness that "passeth all understanding."

HONORABLE WILLIAM E. HALE then addressed the court and said:

May it please the court:

I first became acquainted with Chief Justice Start in the years of 1880 and 1881, when he was attorney general of this state and I was prosecuting attorney of Hennepin county. During this time I saw him occasionally, in consultation about cases pending in this court, which I had tried and which he was to argue. I also tried some cases before him while he was judge of the district court, in Olmsted county. But I became better acquainted with him after he came to this court. I rarely came to the Capitol that I did not drop in at his chambers and have a few moments of friendly conversation—not about law and cases but about men and things in general. I formerly lived in Wabasha county, and knew many of the people in southern Minnesota whom he knew, and he liked to talk about them and the early days of Minnesota. There are others, of course, who knew him much more intimately than I did, and who can bear testimony to his great worth as a man and a friend, but from my somewhat limited acquaintance with him, covering a period of more than forty years, I can truthfully say that he was my friend.

He was true to his principles and to his friends; never unfaithful to the former or forgetting the latter. In devotion to what he considered right, he was as inflexible as steel. As Chief Justice of this court, he gave the best part of his life to the state he so much loved. He came here in the fullness of his manhood, well equipped for the responsible duties which he had assumed. He came to this state from New England,

bringing with him many of the characteristics of the early settlers of the birthplace of our American civilization; among them, industry, honesty and economy.

He was quite set in his ways, and at times seemed blunt in the expression of his opinions. But to those who knew him best, this was never offensive; for they knew that beneath the outside appearance there was an honest mind, and a great, warm, sympathetic heart—as tender as that of a woman.

He was in no sense a politician, nor was he known as a mixer among men, and he resigned his office some years ago, rather than engage in a political contest for re-election.

The key to his success in life was his singleness of purpose, his close application, and a determination to make out of himself all that could be made. He was never blown about by the flaws of fortune, or cast down into the quicksands of irresolution.

In his opinions there is entire absence of technicalities. He never indulged in fine-spun theories. He was broad-minded, taking comprehensive views of the law and facts. His appeal was to an innate sense of justice, to reason and intelligence, and he did it in plain and familiar phrases. He never attempted a display of his learning, or attempted to write a thesis on the law of the case in support of a proposition; he was generally content to cite a few of the leading cases, instead of all the cases on the subject, taken from some encyclopaedia. And these opinions will be his monument so long as the records of the court are preserved.

He believed in self-government—a government of laws—and he believed in their enforcement, as necessary for the safety and happiness of the people. The law never leads civilization, but always follows in its wake. Its purpose is to regulate and control the relations of men with each other, and their relations to the state, and to produce, if need be, justice out of injustice. The nation today seems to stand almost upon the verge of a new and remarkable destiny—for good or bad we cannot tell, and there never was a time in its history when it was in greater need than at the present time of able, conscientious and fearless men to fashion, interpret and enforce the laws. We are a government of laws, and unless they can

be enforced to protect all alike, in their lives, liberties and property, anarchy and barbarism will follow and the government and civilization will come to an end.

And now as we look backward over the long and useful period of the life of our friend, and call to mind the many whom we and he knew, but who have gone with him out into the unknown, we are reminded of the lines written by Lowell on his sixty-eighth birthday :

“As life runs on, the road grows strange
“With faces new, and near the end
“The milestones into headstones change,
“Neath every one a friend.”

HONORABLE ALBERT SCHALLER then addressed the court and said :

It would be repetition to say again what has been so well and truly said of the life, the character and the heroic virtues of the man in whose honor we are here assembled. It is truly meet and just that the great tribunal, over which he so ably presided for so many years, should specially assemble in his honor, and join in the tributes paid to his memory.

Repetition is perhaps the highest praise. We read that the choirs of angels are continually repeating in praise of their Creator the words: “Holy, Holy, Holy,” “Hosanna in the Highest.” So it will not be deemed unfitting that we, following so venerable a precedent, laud again and again the great qualities which distinguished the former Chief Justice.

We knew his upright character, his stern integrity, his loving kindness. We knew the loyal American, the good citizen, the kind father, the learned, honest and upright judge, and withal the faithful Christian gentleman.

Perhaps the most prominent trait in the character of the late Chief Justice was his Christian sincerity. His faith was childlike, his trust in God was absolute, his devotion to duty was profound. The virtues which we so highly honor today were the outgrowth and fruition of his faith, his trust and his devotion.

But of what avail are praise from human lips, or marble monuments,

or eloquent testimonials, when we have passed the portals of death, if they are not justified by a life filled with good deeds, those messengers from earth which penetrate to the very throne of God?

Charles M. Start at his mother's knee learned to honor God and obey His commandments. This teaching dominated all of his actions; to it he held fast to the hour of his death.

His sincere faith, his simple Christian trust and his devotion to duty for duty's sake sustained him throughout a long and useful life, and finally led him into the very presence of God—the eternal, kind and loving Father of us all, who knows our frailties and forgives them, and who rewards our good deeds with the eternal joys of the Beatific Vision.

HONORABLE W. B. DOUGLAS then addressed the court and said:

May it please the Court:

It was my good fortune to know Judge Start well. Our association covered a period of nearly a quarter of a century, most of the time in that relation which an active member of the bar bears to the Chief Justice of our highest court. Five of those years we were associates upon the State Board of Pardons and for a short time as members of this court. Naturally a strong friendship developed between us and it deepened at his fireside after he laid away the ermine he had worn with such conspicuous courage and devotion to the public service.

His was a rare mind and his temperament naturally judicial. True it is that in separating the wheat from the chaff he was sometimes misunderstood by the bar, but let us not forget that

“The truest steel the readiest spark discloses.”

The clear, incisive opinions written by him and preserved as a part of the published records of this court are his best monument. They show us a man of wide vision and constructive mind; still one whose energy and studious habits clearly proved that he knew and respected the precedents. However, he was fearless in extending, developing and applying settled principles in such a manner as to deal justly, humanly and charitably with constantly changing conditions.

To me, this strong desire ever present with Judge Start, to deal kindly with and excuse many weaknesses in human nature as far as settled rules and sound policy permitted, contributed much to placing him as a man

and public officer among our greatest and most deserving. Perhaps this characteristic was better understood by the few who were privileged to serve with him upon the board of pardons. While Judge Start hated crime and could not tolerate or excuse certain acts, still the folded records in many cases, if opened, would bear striking testimony to this trait in his character.

Mentally he was a rugged man and tenaciously stood for high ideals. Coming as he did from old Vermont, I have often wondered what effect that rugged environment had in his development. Certain it is, however, that he shared many of the characteristics of his distinguished predecessor, Chief Justice Gilfillan, who (as we know) was born under like surroundings at Bannockburn, and each brought to the then far Northwest many of the sterling qualities of the people with whom they were early associated.

HONORABLE L. L. BROWN then addressed the court and said:

May it please your honors:

When I came to the Third judicial district as a law student Judge Start was on the bench. There he continued until promoted to the Chief Justiceship, where he so long conscientiously dedicated his full strength to the service of the state. The office was an honor to him as it is to any man, but he in turn reflected honor upon the office. He was the servant of his obligation to duty, and at all times, without stint or reservation, delivered the full wealth of his power to the fulfilment of his obligation. This is not simply an extravagant eulogy, which Judge Start of all men did not approve on such occasions as this. It is a plain statement of what the people of the whole state know, but the people of the Third judicial district knew Judge Start best, and we wish to place upon the record of this occasion, where we are come not to praise but to truly and solemnly record a genuine estimate of the public services of one who has passed beyond the range of praise or blame, the testimony of those people, and their estimate of Judge Start as a jurist and citizen that it may be known of those who come after. Their estimate not one only now expressed, but one fully formed and unanimously vouched for as neighbors long before he came to this bench, and while he worked among them. That estimate is an historical fact. Politically the Third district was

opposed to Judge Start. By the statute his term was fixed at six years; by a higher law, decreed by the people of that district as one man, it was made for life. This is the value long ago placed upon the character and services of Judge Start by his neighbors who knew him well and over whose court he so long presided. This might be said of other men, but when this simple fact has been recorded we have done enough. It proves more than many words of eulogy. It is a complete and fitting memorial, and no more need be said—but a word yet.

I was examined and admitted in Judge Start's court, and there commenced practice very poorly prepared. And, as courage consists in equality to the problem before one, accordingly distraught by misgivings and doubt as well as want of bread, the problem of my obtaining any footing at the bar was a serious one. My fate was as has been that of other beginners in the hands of the court. What is in a man will come out through his work. The man will shine through the judge. It is possible to be a great man without being a great judge, but it is not possible to be a great judge without being a great man, and Judge Start was a great judge. That I would here be short of my duty to Judge Start's memory is my justification for this personal allusion, when I say that the man shining through the judge gave to me, as it did to others, the encouragement which has saved the day for many a young practitioner. All of the discipline which Judge Start administered to me in after years was drowned in his earlier kindness and consideration, and he did not go to his reward without knowing what I record here. A wonderful human heartedness, broad, clear and just, with simplicity and uprightness, characterized the man.

All in all, the Chief Justice, although conservative, was always in touch as judge and citizen with that occult thing, the spirit of the times, and his work on this bench is and will remain a solid major factor in the jurisprudence of this state as moulded by its judges. All men seem to think that humanity and its institutions may change, recede and deteriorate. By that token we ought to believe that advancement and improvement toward greater enlightenment and justice is possible, and I am one of those, as was the Chief Justice, who do so believe. That is faith in humanity which we must have and which we call sanity.

Cardinal Newman paints the canvas in these words:

"To consider the world in its length and breadth, its various history, the many races of man, their starts, their fortunes, their mutual alienation, their conflicts; and then their ways, habits, governments, forms of worship; their enterprises, their aimless courses, their random achievements and acquirements, the impotent conclusion of long-standing facts, the tokens so faint and broken of a superintending design, the blind evolution of what turn out to be great powers or truths, the progress of things, as if from unreasoning elements, not towards final causes, the greatness and littleness of man, his far-reaching aims, his short duration, the curtain hung over his futurity, the disappointments of life, the defeat of good, the success of evil, physical pain, mental anguish, the prevalence and intensity of sin, the pervading idolatries, the corruptions, the dreary hopeless irreligion, that condition of the whole race, so fearfully yet exactly described in the Apostle's words, 'having no hope and without God in the world,'—all this is a vision to dizzy and appal, and inflicts upon the mind the sense of a profound mystery, which is absolutely beyond human solution."¹

If we broaden this canvas to include the passing tragedy which has shattered the world and the epidemic of unmoral materialism following in its wake, this is a serious picture, but not appalling. Though the hopes of some are at zero, the mystery is not beyond human solution, and that solution can come, and will come as the timely fruit of the hard labor of those rugged men and women of the type and character of him whose memory we recall to-day.

WILLIAM D. MITCHELL, ESQ., then addressed the court and said:

May it please the court:

The work that our judges have to do upon the courts of the states and of the nation may be properly grouped under two heads.

At times they have to consider controversies of great public interest, involving governmental questions of importance, the decision of which, sometimes temporarily, but often permanently, determines in some degree the direction of governmental activity and affects the character and powers of the government under which our people live.

On the other hand, by far the larger part of their work is in the ordinary administration of justice between private citizens, having to do with matters of a purely personal and private nature.

[¹ *Apologia pro Vita Sua*. Part VII]

Although epochal decisions of great public questions may seem overshadowing in importance, it is, after all, the daily administration of justice among the people, in the ordinary affairs of every day life, that is of vital interest to the greatest number, and it is the manner in which that work is done which creates in their minds either satisfaction or discontent with our judicial system.

In looking back over the work performed by Chief Justice Start during his eighteen years upon this bench, it seems to me that, among all his accomplishments, the outstanding feature of his judicial career is the splendid manner in which he did the very work of which I speak; the administration of justice in disputes between all kinds and classes of people, arising in the ordinary every day affairs of life.

He believed that, to the average suitor, justice was denied, unless speedy and without delay, and with that in mind, as presiding justice of this court, he endeavored, notwithstanding the great volume of litigation before it, to promptly dispose of its business.

Earnestly and conscientiously he strove during all those years to produce results which appealed to his sense of right and justice, and to make all litigants, of whatever station in life, feel that their causes had received painstaking attention.

He sometimes chafed under the restraint of rules of law, the application of which in particular cases seemed to produce results which did not accord with his conscience, and, within the limits of the judicial power, endeavored to mitigate their harshness in practical application.

How well he performed his duties is evidenced by the fact that from the time he assumed the office of Chief Justice of this court, until he voluntarily laid it aside eighteen years later, he continuously enjoyed the universal respect and confidence of the people of this commonwealth. His work added to the dignity of this court, and brought lustre to his name. He was, in every true sense, a guardian of the rights and liberties of the whole people, and for his long and faithful service to his state, he deserves the grateful remembrance of his fellow citizens.

HONORABLE GEORGE W. PETERSON then addressed the court and said:

There is a splendid representation here in behalf of the senior bar and

the judges. I would like to pay my respects and the homage of those similarly situated in behalf of the relatively junior bar. Even so it is almost 25 years since I came to the bar of this court. The court has wholly changed except one. I think there should be a reference in this memorial to the letter of Judge Start of October 29, 1918. It was addressed to the bar. It was written of the court. I read from it as follows:

"As the years have gone the Minnesota Supreme Court has become more and more a humanitarian, equitable, nontechnical and business-dispatching court. It is, indeed, such a court. The humblest has his personal and property rights protected. Laborer, mechanic, farmer, business man—all are alike before it. There are no favorites. It has been the effort of the court to make law and justice approach and co-ordinate without impairing the law. The symmetry of the rule has been made to yield to practical justice. All this has not come about without some struggle. It is the work of no one man. A procession of men have helped.

"A court is very much a composite of the men who form it. A good judge ought to be vigorous, keen-sighted, forward-looking, industrious and of exact legal learning. He should be fair-minded, conscientious, patient, forbearing, and withal he must not have lost the common touch which puts him in appreciative contact with average humanity and its aspirations and its problems. He must not truckle to class, nor fear public clamor, nor yield to public nor private threat. He must be independently square. If he is unwilling to lose judicial life rather than break with the truth, he is unfit to have it."

It is not unfair to any man to say that no other man could have written so fine a letter, and even then Death plucked him by the eloak to come with him.

In *Leavitt v. City of Morris*,¹ Judge Start showed a broad and comprehensive constitutional sympathy. In *Railway Company v. City of Minneapolis*,² in a dissenting opinion, he showed great independence, courage, and a fine appreciation of constitutional limitations. In *Gilfillan v. Schmidt*³ he dissented from the doctrine of *Sheehan v. Flynn*,⁴ but in *Oftelie v. Town of Hammond*⁵ he consistently adopted that doctrine and wrote the opinion of the court.

[¹105 Minn. 170, 117 N. W. 393]

[²115 Minn. 473, 133 N. W. 174]

[³64 Minn. 29, 66 N. W. 126]

[⁴59 Minn. 436, 61 N. W. 462]

[⁵78 Minn. 275, 80 N. W. 1123]

He said of a distinguished member of this bar, "He was never false to any man or cause." Could those words be more fittingly said of any one than of Judge Start? He was never false to any man or cause. He wore the white rose of a stainless life, and gracefully bore that grand old name of gentleman. He loved his work, his chambers and his books. These lines of Kipling, taken from "When Earth's Last Picture is Painted," are appropriate:

"And only the Master shall praise us, and only the Master shall blame;
And no one shall work for money, and no one shall work for fame,
But each for the joy of the working and each, in his separate star,
Shall draw the Thing as he sees it for the God of Things as They Are!"

HAROLD J. RICHARDSON, ESQ., then addressed the court and said:

On this occasion I cannot attempt to speak in words of eulogy, but only to testify to my affection and love for a life-long friend. Judge Start was an heroic ideal of my boyhood. He was then judge of the Third judicial district. He was the first citizen of his beloved city of Rochester; first in his profession; first in patriotic and civic affairs; first in the affections of the people.

Yet he took time to be one with the school boys who met him in the street, and who used, on frequent occasions, to visit his court room. He was a neighbor, one of my father's closest friends, and today there comes to me words which my father used to say of him in those years: "Judge Start is one of God's noblemen."

The last years of Judge Start's life were among his bravest and best. He had finished his great work as Chief Justice of this court. Yet with the wisdom which ruled his life, he renewed his practice of the law and so kept in contact with the world's work. It was a privilege to associate with him and to enjoy his friendship, to witness his devotion to the law and his wisdom and skill in the practice of it during those years. It was an inspiration when the war came on to observe the depth of his love for his country, and to see the glow of his fiery and courageous patriotism.

And now this Valiant-for-Truth, having fought his fight, has passed over. He has left his sword in the opinions he has written, to be wielded by those who shall succeed him in the Pilgrimage.

The memory of his wisdom and his skill, his faith and his devotion, will linger as a legacy in the hearts of all who knew him. Let it be said of all his life as was said those earlier days in Rochester: "Judge Start was one of God's noblemen."

HONORABLE THOMAS D. O'BRIEN then addressed the court and said:

May it please the court, Mr. Burt W. Eaton, chairman of the committee on memorial, is in a hospital at Rochester and unable to be present. Judge Callahan of Rochester, and Mr. Webber of Winona, are unavoidably detained by their professional engagements and asked that their names be included among those who desire to pay their tribute. I now move that the memorial and the addresses which have been presented be made a part of the permanent records of this court.

CHIEF JUSTICE BROWN then said: Former Associate Justice David F. Simpson expected to be present today to pay his last tribute to the memory of Judge Start, but is unavoidably absent, and this may be noted as a part of the proceedings of the day. Associate Justice Quinn had prepared his tribute also to the memory of Judge Start, but he is unable to be present and his remarks will be spread upon the records of the proceedings of the day. We will now listen to Judge Lees, who will speak for the court.

JUDGE LEES then said:

If Judge Start could speak, he would protest against praise of himself or his work, despite the fact that eulogy of the dead is the common thing. It would be his wish that whatever was said of him should be temperate in expression, and should not overdraw his virtues, and I shall attempt to be mindful of what he would wish.

My acquaintance with him began in 1887, when he had already been judge of the district court of the Third judicial district for over six years. I was a practitioner before him from that time until he became Chief Justice, and met him frequently both in and out of court. The admiration of him which was then formed continued to the end of his life and prompts me to pay a tribute to his memory.

His natural temperament was fervent. He had been a vigorous advocate when at the bar. He was the contemporary of Thomas Wilson, William Mitchell, Charles C. Willson, W. C. Williston, Thomas S. Buckham, and other lawyers of Southern Minnesota of perhaps equal ability. They all agreed that in the trial of an action he was a dangerous antagonist, skilful in the examination of witnesses, eloquent and forceful in argument, and sure in his knowledge of the facts and the law of his case. He made his client's cause his own and championed it with the utmost earnestness and zeal, but always fairly, for he abhorred everything that savored of fraud or sharp practice. So marked was this trait that when as a trial judge he detected anything indicating trickery or deceit, he would flame with indignation and thereafter the party whom he believed to be guilty of it stood little chance of getting a favorable decision. His conclusions as to the rights of the parties were apt to be unconsciously communicated to the jury by his demeanor. As a consequence, verdicts were usually in accordance with his idea of what they should be. His findings in cases tried without a jury were generally followed by a memorandum summing up the evidence and stating the law he deemed applicable. An attorney once said to him that in following this practice he furnished a ready-made brief for the prevailing party in case of an appeal. He retorted, that such was not his purpose, that he wrote only to point out to the defeated litigant and his attorney why the case was lost. He was prompt in the dispatch of business and looked with disfavor on the tendency of many attorneys to put off the trial of their cases. To the younger members of the bar, he was invariably helpful and considerate; with the older ones, who sometimes ventured to presume on their standing and experience, he was firm and decisive, so that few attempted to take any undue liberties a second time. He came to be regarded as one of the ablest trial judges in the state, and this reputation had much to do with his advancement to the position of Chief Justice of this court. It is interesting to note that when he came here his brother, Henry R. Start, was one of the judges of the Supreme Court of Vermont, having been elected in 1890 and holding office until his death in December, 1905.

Judge Start became a member of this court when its business had reached high water mark. The April calendar for 1895 had 340 cases upon it; 98 were continued to the October term and the remainder dis-

posed of. The calendar for October contained 357 cases, and all but 37 were disposed of. With but five judges on the bench, this meant working at white heat for all of them. He was convinced that justice delayed is apt to be justice denied and that, so far as possible, all cases on the calendar should be disposed of during the term. He believed that a long drawn out opinion is not helpful to the bench or bar, and that it is unnecessary to write a legal essay in deciding a case involving no novel application of legal principles.

No man ever sat here who was more concerned that cases should be correctly decided. He often remarked that this is a court of last resort and that errors in its judgments are subject to review only in the few instances in which a question arising under the Federal Constitution is presented. He was solicitous that no fact or principle of law which might have a bearing upon the decision should be overlooked. He did not spare himself the labor of examining and considering the records and briefs in every case before the court. He was a tireless worker, wholly absorbed in his work. Being asked by a friend how he had spent the summer vacation, he replied: "Principally in reading our decisions since last October and annotating the statutes and reports." His annotations of his set of Minnesota Reports are a marvel of industry.

He respected himself and his position, but was wholly free from pride of office. By habit, as well as by instinct, he was strongly democratic. At bottom he was a Puritan—not in a religious sense, but in that his code of morality was strict. He was not inclined to condone an offense or excuse an offender by putting the responsibility on heredity or environment. He believed that a man should answer personally for his conduct and he consistently acted on his belief. Those who did not know him well, thought they saw in him asperities of temper and manner. In truth, he was a warm-hearted man, deeply attached to his friends, and with impulses which were invariably kindly. He enjoyed the visits of members of the bar who dropped into his chambers for a chat. Such visits were less frequent than he wished them to be because most of us feared we might be trespassing on his time, known to be greatly occupied.

Judged by the standards of today, he was a conservative. He did not look with favor upon experiments in government, believing that the original lines laid down in the Constitution should be followed in the

development of the state. He respected property rights, stating more than once that the small property holder was concerned even more than the man of wealth in having secured to him and his children the fruits of his industry and self denial.

Endowed by nature with an alert and vigorous mind and of a strong and resolute character, he impressed his convictions upon others to a marked degree. Of unfailing probity and with a deep sense of duty to which he was always true, he justly gained the respect and confidence of the public. He was an important figure in Minnesota. His death marks the passing of an earlier generation of lawyers who have had the principal part in giving to the state the system of laws by which it is governed.

ASSOCIATE JUSTICE QUINN'S tribute is as follows:

It was the sturdy manhood of Chief Justice Start that appealed most to me. There was in him no fawning or yielding of self-respect. His chart of life was: "To thine own self be true." He lived always on the heights, he "walked on the mountain range" and never descended to the plains where lesser men falter. The nobility of his character permitted homage to none save to his God and the eternal truth. While such abounding self-respect may at times lend to man an apparent austerity, yet it constitutes the chief source of power, leadership and greatness among men.

Such a man was Judge Start. It was his rugged, unflinching manliness, manifested in his every act, which attracted the profound respect of all classes, and endeared him so closely to his associates of the bench and bar. It was this which in early life led him to the duties of a soldier where all manly qualities are so fittingly employed. It was this trait of his character that caused him to so despise everything like cant, hypocrisy and subterfuge. Show and pomp were entirely foreign to his nature. Neither could he tolerate the slightest taint of fraud or deceit. His decisions abound with unmeasured condemnation of everything approaching dishonesty or double dealing.

Believing in himself, he believed in humanity. He spent his life administering justice with the single aim to make it approximate, as nearly as possible, the justice of the infallible Ruler of the Universe. He

believed in the teaching that "the law was made for man and not man for the law." He studied deeply the ever growing complexity of our modern life and strove to adapt the law to humanity's needs as they arose. His legal attainments were of the highest order, his knowledge of precedents profound, but they were always subordinated to his idea of service to man. Precedents were to him but guides blazing the way, he never permitted them to thwart what he believed to be the purpose of the law, that is, the protection of those who were entitled to protection. His life after quitting this bench was devoted to generous ministrations to obtain what he believed to be justice to all men.

I have said that such a man was likely to be judged as cold and austere, but to those whose privilege it was to come within the circle of the friends of Charles M. Start, was given to know the wealth of his personal feeling for his fellows. His nature was singularly desirous of comradeship; he craved the society and companionship of men. But he was drawn to them, never by their wealth or prominence, but solely by their honor and manliness, which qualities he discerned with almost unerring intuition. During the "overtime" allowed him at the close of his life, it was his never failing delight to gather with his friends and satisfy his longing for human fellowship. Those whose privilege it was to join in this circle were often amazed at his sparkling wit, quiet humor and rich fund of anecdote. His gentleness, however, never permitted him to say for the sake of humor a word that might wound the feelings of any man; rather would he choose such incidents as made himself the object of the witticism. Justly was he ever allowed to do most of the entertaining, and his good sense, originality, freedom from personalities and purity of thought and language, made these occasions a delight never to be forgotten.

It is a singular truth that men often characterize themselves in characterizing others. I think our departed friend did this when he so aptly said of his long loved friend and associate, Judge Severance:

"He was gentle and genuine, tender and true. His genial humor, his sympathetic kindness, his perfect integrity, his chivalrous manliness and his pure life endeared him to his friends and associates and made him one of the best-loved of men and judges."¹

[1102 Minn. XXXII]

CHIEF JUSTICE BROWN then said:

Intimate personal as well as official relations with Judge Start for twelve years of his term of service as Chief Justice, constant and almost daily association with him during that time, qualify me to bear witness to the truth of the Memorial, and of the deserved tribute paid to his memory by those who have addressed the court. Nothing can be added to what has been so well and eloquently presented. One of the conspicuous characteristics of Judge Start in his judicial work was a strong inclination to turn all fair doubts in controversies submitted to him for decision, in favor of human as distinguished from strict property rights. Yet in no case would he violate settled rules or principles of law to reach a result of that kind. He was honest to himself, upright in the performance of his duties, and his conscience led him along the path of rectitude in the discharge of all his obligations, official as well non-official.

May the example of his pure life, his high character, his faithful devotion to duty, be an inspiration to those who in future are to follow in his footsteps as trusted judicial servants of the state.

The Memorial will be spread upon the records of the court there to remain a perpetual testimony of an exemplary life, a faithful public servant.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF MINNESOTA.

**STATE EX REL. TWIN CITY BUILDING & INVESTMENT
COMPANY v. JAMES G. HOUGHTON, AS INSPECTOR
OF BUILDINGS OF THE CITY OF MINNEAPOLIS.¹**

October 24, 1919.

No. 21,104.

Eminent domain — public use — restricted residence district.

Condemnation cannot be had for a use which is not public, and the condemnation of property against its use for an apartment building, as provided by Laws 1915, c. 128, is not for a public use. [See Paragraph 2 below.]

January 23, 1920.

Subject of act expressed in its title.

1. The subject of Laws 1915, c. 128, relating to restricted residence districts in cities of the first class, for the establishment of which condemnation is provided, is sufficiently expressed in its title within the constitutional requirement, though the subject of condemnation is not mentioned in it.

Prohibition of apartment houses constitutional.

2. Laws of 1915, c. 128, provides for restricted residence districts in cities of the first class in which certain classes of buildings shall not be

¹Reported in 174 N. W. 885 and 176 N. W. 159.

erected. Such restricted district is established by the exercise of the power of eminent domain, and apartment houses, among other classes of buildings, are prohibited therein. The Constitution permits the taking or destruction or damage of private property for public use alone. It is *held* that the restriction as applied to an apartment house is based upon a public use and that the statute providing for condemnation is constitutional.

Upon the relation of the Twin City Building & Investment Company the district court for Hennepin county granted its alternative writ of mandamus directed to James G. Houghton, as inspector of buildings of the city of Minneapolis, commanding him to issue to relator a permit and license to install electric wiring in a certain building, or show cause why he had not done so. The matter was heard before Molyneaux, J., who sustained plaintiff's demurrer to the return of respondent and ordered that the permit issue. From the judgment entered pursuant to the order for judgment, the inspector of buildings appealed. Reversed on reargument.

C. D. Gould and R. S. Wigin, for appellant.

The answer set up that on February 23, 1918, relator applied for a permit to build a three-story apartment house at a cost of about \$50,000; that on March 8, 1918, the city council passed a resolution pursuant to Laws 1915, p. 180, c. 128, designating the block in which relator's land was situated as a restricted residence district, and directed the building inspector not to issue any permit for the building of any structure prohibited under the resolution; that relator was informed immediately of the action of the council, but made application to the building inspector for a permit for electric wiring in such building which was refused; that no work had been done in construction of the building, and the premises were still vacant and unoccupied.

Chapter 128, p. 180, Laws 1915, is constitutional, and the protection of the public health, safety, convenience and welfare is a public use. The right of eminent domain may be exercised to protect the public health and provide for the public convenience and welfare. *Lien v. Board of Co. Commrs. of Norman County*, 80 Minn. 58, 62, 82 N. W. 1094. The particular kinds of business prohibited by this act: Coalyards, public garages, public stables, dyeing, cleaning and laundering establishments,

bill-boards and blacksmith shops, have all been held to be such as might be prohibited in any particular district, in the exercise of the police power, even without compensation. Is it not a valid exercise of the power of eminent domain to protect a particular part of the public from the encroachment of such business as the courts say may be protected in the exercise of the police power? In *State v. Houghton*, 134 Minn. 226, 158 N. W. 1017, the court was careful not to decide whether a mercantile establishment could be prohibited.

The question what is a public use is a question for the court, but necessity or expediency in the exercise of the power of eminent domain for the public use is a question for the legislature. *Lewis*, Em. Dom. (3d ed.) § 251. See also section 271; *Attorney General v. Williams*, 174 Mass. 476, 480, 55 N. E. 77; *In re City of New York*, 57 App. Div. 166, 68 N. Y. Supp. 196, 200, affirmed 167 N. Y. 624, 60 N. E. 1108; *Shoemaker v. U. S.* 147 U. S. 282, 297, 13 Sup. Ct. 361, 37 L. ed. 170. If the public health, safety, convenience and welfare are protected by the creation of restricted districts, public money may be expended in securing the benefit thereof.

For a use to be public it is not essential that the entire community or any considerable portion of it should directly enjoy or participate in the improvement, for the benefits from it will inure to the use and benefit of the parties concerned, considered as members of the community or of the state, and not solely as individuals, and it is not fatal to the act if private interests be advanced. *Sisson v. Supervisors*, 128 Iowa, 442, 454, 104 N. W. 454, 70 L.R.A. 440; *State v. Board of Co. Commrs. Polk County*, 87 Minn. 325, 338, 92 N. W. 216.

John E. Samuelson, Leonard McHugh and M. T. O'Donnell, as attorneys for the city of Duluth, filed a brief as amici curiae.

The city council of Duluth began proceedings under the act of 1915 to establish a residence district by passing the necessary resolution on June 30, 1919, appointing appraisers and directing the necessary steps to be taken to complete the restrictions, when a property owner in the proposed district filed his complaint to restrain the city from establishing such district and secured an order temporarily restraining the city from proceeding further in the matter, and after a hearing upon an order to show

cause the presiding judge announced he would await the decision of the supreme court in this present case.

A. Where police power is not broad enough, eminent domain may be resorted to. It would seem that the only objection to such restrictions which the court found in the act of 1913 arose from the failure to provide compensation for the prohibition. *State v. Houghton*, 134 Minn. 226, 158 N. W. 1017. The legislature of 1915 passed the present act to cure this defect. The police power may be evoked without giving compensation, while the power of eminent domain cannot be exercised without giving compensation. The one is usually called a regulation, the other a taking. But either power must be exercised for the public need. If a regulation or restriction on the use of property goes beyond the limits prescribed for the police power, it then falls within the realm of eminent domain. Therefore there is no logical reason why such regulation or restriction may not be imposed under the power of eminent domain, so long as it satisfies the constitutional requirements of giving compensation and being exercised by due process of law.

B. Powers granted by the act of 1915 are for a public use. Public use is the employment or application of a thing by the public, or use by the public. *Minnesota Canal & Power Co. v. Koochiching Co.* 97 Minn. 429, 107 N. W. 405. Our court qualifies its definition of a public use by giving it the conception of benefit, of public utility and of general welfare. If the charter of the company named had not limited the power of the company to furnishing water from the *wheels thereof*, the court undoubtedly would have sustained the use as a public use. In the case of *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, the question of public use did not arise. The public welfare and convenience require that there should be parts of the city wherein the members thereof can erect homes, knowing that they will be able to get away from business buildings and crowded flat buildings and enjoy their homes without annoyance. It cannot be denied that there is a great demand for such places to erect residences, such demands being evidenced by the fact that the state legislature has twice enacted legislation on these lines, and that the councils of St. Paul, Minneapolis and Duluth have promptly taken advantage of such laws to create such districts. It is not necessary

that it should be a use for the entire public. *Lien v. Board of Co. Commrs. of Norman County*, 80 Minn. 58, 82 N. W. 1094.

Public use may exist in the form of a prohibition of a private use. There are countless cases where the police power has been legally used to serve public uses through prohibition, restriction on the use of private property. There are cases where eminent domain has been used to serve public purposes through a negative use. *Attorney General v. Williams*, 174 Mass. 476, 55 N. E. 77; *In re City of New York*, 57 App. Div. 166, 68 N. Y. Supp. 196, affirmed 167 N. Y. 624, 60 N. E. 1108. Restriction of flats from an exclusive residential district serves a public use. Very fine residences are usually surrounded by spacious lawns and plenty of shrubs and trees. Such a district serves the same public use for which parks are created. They are in reality parks maintained at private expense. Every citizen takes pride in such districts and visitors to the city take away with them a fine picture of such city, owing to such districts. Such a restricted residence district prevents congestion which is another public use of health and general welfare.

In the construction of constitutional limitations the courts must keep pace with the times and recognize changing conditions and growing interests. In *Noble State Bank v. Haskell*, 219 U. S. 575, 31 Sup. Ct. 299, 55 L. ed. 341, upon petition for rehearing, the language of Justice Holmes was that certain cases were cited to show that among *public* uses for which property might be taken, *not for a private use*, were some which, if looked at only in their *immediate aspects*, might seem to be private. This case is of that character.

A. B. Darelhus, for respondent.

The act of 1915 is invalid because it contravenes article 4, § 27, and article 1, § 13, of the state Constitution. The condemnation of private property, or rather the taking away the right of the property owner to improve his property in his own way is not embraced within, or suggested by, the title of the act. The title gives no suggestion of the right of the city to take property in connection with the creation of such residence districts. *State v. Kinsella*, 14 Minn. 395, 397 (524). Section 13 of article 1 prohibits the taking of private property except for a public use. Private property cannot be taken for a private use. *State v. District Court*, 133 Minn. 221, 158 N. W. 240. Sections 22 and 23 of 10

R. C. L. enumerate what is a public use. The taking of relator's property does not come within either of the classes enumerated. *City of Minneapolis v. Janney*, 86 Minn. 11, 90 N. W. 312; *Minnesota Sugar Co. v. Iverson*, 91 Minn. 30, 97 N. W. 454. Appellant does not contend that the erection of an apartment house on the designated premises will constitute a nuisance, a menace to health or be dangerous to life or limb or even offensive to aesthetic taste. If it is a benefit at all to exclude such improvements, it is purely a private benefit.

It is simply to prevent overcrowding and congestion in the larger cities. To prevent the building of undesirable and unhealthy structures, the shutting out of light and air, the housing act of 1917 (chapter 137, page 185), was enacted by the legislature.

Baldwin, Baldwin & Holmes filed a brief as amici curiae.

Unless the taking be for a public use the act of 1915 is invalid, as otherwise it violates article 1, § 7, of the state Constitution and the Fourteenth Amendment of the Federal Constitution, both relating to due process of law. By the restriction neither the public, nor its agents, have the right to enter upon, use or enjoy these premises in any way, nor to regulate their use save by the prohibition of these harmless projects. What is secured is the right to prohibit, not a right to use. Put in another way, the city has sought to acquire the right to pass what is essentially a police ordinance, held invalid as to such projects under the police power. See 1 Minn. Law Rev. 490. Is the expansion of the police power beyond its constitutional limits the taking or damaging of property "for public use?" See *State v. Houghton*, 134 Minn. 226, 158 N. W. 1017, for a satisfactory definition of the limits of police power applicable here.

Minnesota is expressly committed to the doctrine that "public use" means actual "use by the public." *Minnesota Canal & Power Co. v. Koochiching Co.* 97 Minn. 429, 107 N. W. 405. Hence it is obvious that as this right involves no user or taking possession by the public or its agents it cannot be acquired as a public use. What interest or benefit has anyone in this project except the immediate landowners of the residence district involved, and possibly of the immediately adjacent property? But if none but the immediate neighborhood is benefited, then under the rule the use is not a public use.

The following opinions were filed October 24, 1919:

DIBELL, J.¹

Mandamus on the relation of the Twin City Building & Improvement Company against James G. Houghton, inspector of buildings of Minneapolis, to compel him to issue a building permit. There was an answer to the alternative writ to which a demurrer was sustained and judgment was then entered for the relator from which the defendant appeals.

The question is upon the right of the relator to construct a three-story apartment building upon property which he owns in Minneapolis. His right to do so is conceded, unless he is prevented because of certain proceedings taken by the common council of Minneapolis, pursuant to Laws 1915, p. 180, c. 128, resulting in the designation of block 8 in J. T. Blaisdell's Revised Addition to Minneapolis as a restricted residence district in which the construction of such a building is prohibited. The relator owns lot 13 and the south 34.9 feet of lot 12 in this block and purposes erecting an apartment building. Sections 1 and 2 of the act of 1915 are as follows:

Section 1. Any city of the first class may, through its council, upon petition of fifty (50) per cent of the owners of real estate in the district sought to be affected, designate and establish by proceedings hereunder restricted residence districts within its limits wherein no building or other structure shall thereafter be erected, altered or repaired for any of the following purposes, to-wit, hotels, restaurants, eating houses, mercantile business, stores, factories, warehouses, printing establishments, tailor shops, coal yards, ice houses, blacksmith shops, repair shops, paint shops, bakeries, dyeing, cleaning and laundering establishments, bill-boards and other advertising devices, public garages, public stables, apartment houses, tenement houses, flat buildings, any other building or structure for purposes similar to the foregoing. Public garages and public stables shall include those, and only those, operated for gain.

Nothing herein contained shall be construed to exclude double residences or duplex houses, so-called, schools, churches, or signs advertising for rent or sale the property only on which they are placed.

No building or structure erected after the creation of such district shall be used for any purpose for which its erection shall be prohibited hereunder.

¹[See third paragraph on page 21.]

The term "council" in this act shall mean the chief governing body of the city by whatever name called.

Sec. 2. The council shall first designate the restricted residence district, and shall have power to acquire by eminent domain the right to exercise the powers granted by this act by proceedings hereinafter defined, and when such proceedings shall have been completed the right to exercise such powers shall be vested in the city.

If under this statute the relator's property can be condemned against its use as a site for an apartment building, it is not aggrieved, and the only question which we find necessary to determine is whether there is a public use upon which to rest a condemnation.

The right to condemn private property for public use is not questioned. It is an attribute of sovereignty. The private owner holds his property subject to the superior right of the state to take it for public use, but it cannot take it except for public use. The payment of compensation gives no right. It is a condition to the exercise of the right. Whether the use is a public use is a judicial question. The courts are charged alike with the duty of giving effect to the sovereign right to take and of protecting the individual against an appropriation for other than a public use.

The right of the owner to use his property as he sees fit, if he does not unjustly injure others, is as much unquestioned as is the sovereign right to take it for public use. It is fundamental in our government. It makes ownership valuable and attractive. It is a right cherished as an incident of our free institutions. Its exercise is an affirmation of the equality of all before the law and a denial of class superiority. Of course the private owner may be restricted in the use of his property without its appropriation by condemnation. He is only one of the community. He must yield to its welfare. He must not use his property so as unnecessarily or unjustly to interfere with others. He must not create a nuisance. His protected private right is subject to the exercise of the police power resident in the state to prohibit, and this without compensation, a use of his property which injuriously affects the public health or safety or general convenience and welfare of the community.

The use to which the relator purposes putting its property is legitimate. Not all people can live or wish to live in detached houses. Some

from choice and some from necessity seek apartments. It is true that apartment buildings are not welcome in exclusive residence districts. Their appearance is not liked. They bring more people into the neighborhood and their presence there and their going and coming is thought by some undesirable. It is not sought to prohibit apartments, nor to prevent people living in them. It is proper enough that apartments be located elsewhere and that people live in them there, for the living conditions they offer are wholesome and the people who use them are good people. They are banned because of the environment. An apartment building does not affect the public health or public safety or general well being so that it may be prohibited in the exercise of the police power. This we take to be the effect of our decisions. *State v. Houghton*, 134 Minn. 226, 158 N. W. 1017, L.R.A. 1917F, 1050; *State v. City of Minneapolis*, 136 Minn. 479, 162 N. W. 477. If such a building affects the public health or safety or well being of the community within the meaning of the police power, it can be outlawed by ordinance or statute without condemnation and accompanying compensation, and there is no need of condemnation against a nuisance. It is only when something rightfully belonging to another is to be taken from him in the exercise of the superior sovereign right for a necessary public use that resort need be had to condemnation.

By the condemnation which the statute provides neither the city nor the general public gets a physical use of the condemned premises. They cannot use them in any way. They do not wish to use them in the ordinary sense. They do not want them used for an apartment. They cannot go upon them. The so-called use is negative; it prevents an otherwise lawful use by the owner and in no other way is it a use at all. He still owns the land, and can keep people off it. He may leave it vacant. He may build any kind of a building which he chooses except one forbidden by the statute. A fifty per cent vote, with the approval of the common council, has made it so if it is so. It is not so unless the use is public.

When once the principle is announced, that a residence district may be created by the common council upon a majority vote of the owners and the land condemned against the use of the property for an apartment building, the way is open for the condemnation, upon legislative authori-

zation, of property in exclusive residence districts against a use for substantially any class of dwellings then thought to be not in keeping with community surroundings. It may reach the humble and shabby dwelling, for such a dwelling may be found objectionable as readily as an apartment. And when the humble home is threatened by legislation upon aesthetic grounds, or at the instance of a particular class of citizens who would rid themselves of its presence as not suited in architecture or in other respects to their own more elaborate structures, a step will have been taken inevitably to cause discontent with the government as one controlled by class distinction, rather than in the interests and for the equal protection of all. It is not believed that the public welfare can be promoted by such legislation.

We do not overlook nor discourage the tendency to extend the power of restriction of the use of city property through the exercise of the police power in aid of more wholesome and sanitary living conditions. The housing act of 1917, not yet construed, is an illustration. Laws 1917, p. 185, c. 137. The act of 1915, as applied to the situation before us, has no purpose to improve housing conditions. The tendency noted is illustrated in *State v. Houghton*, 142 Minn. 28, 170 N. W. 853, where we held that the exclusion of a factory manufacturing cereal products from a restricted residence district, created pursuant to Laws 1913, pp. 102, 618, cc. 98, 420, was sustainable under the police power, though the district was sparsely settled, and though the property was naturally suited for the use of such a factory located as it was on a railway line, but the use of the factory involved substantial physical discomfort and annoyance to the residents. In many ways, not worth the while mentioning here, one may, by legislation under the police power, be restricted in the use of his property. *Dunnell*, Minn. Dig. and 1916 Supp. § 1603, et seq. And as a matter of private right, without legislation under the police power, we sustain an interference by injunction with the operation of a stone quarry so conducted as to bring substantial physical discomfort and annoyance to nearby residents. *Brede v. Minnesota Crushed Stone Co.* 143 Minn. 374, 173 N. W. 805. And in the same way we sustain a restriction of the use of property for stabling purposes. *Lynch v. Shiely*, 131 Minn. 346, 155 N. W. 958.

The case before us is not in principle nor in facts like *In re City of*

New York, 57 App. Div. 166, 68 N. Y. Supp. 196, where there was a condemnation for the purpose of widening a street by adding a strip on each side, which was not to be used for purposes of travel but for ornament and beauty, with a reservation of a limited use in the owner. Nor is it like *Bunyan v. Commissioners*, 167 App. Div. 457, 153 N. Y. Supp. 622, where land used as a stone quarry along the Palisades of the Hudson was condemned for the purpose of preserving the scenic beauty of the river and the park. Nor is it like *Attorney General v. Williams*, 174 Mass. 476, 55 N. E. 77, 47 L.R.A. 314, where a statute limiting the height of buildings about Copley Square and providing for compensation was sustained. Nor is it like *U. S. v. Gettysburg Electric Ry. Co.* 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576, where there was a condemnation for preserving, improving and ornamenting the battle-field of Gettysburg. These uses were public. -

No question is made of the right under proper authorization to condemn property for boulevards or for pleasure drives or for public parks or for public baths or for public playgrounds or for libraries and museums or for numerous other purposes which contribute to the general good and well-being of the community. In such cases there is a public use. In the condemnation here we see none. The desire of exclusive residence districts to preserve their environment is worthy enough. In condemning property against a building which is in itself proper and useful and offends only because it is out of harmony with the neighborhood surroundings we do not find a public use. We recognize that what constitutes a public use changes from time to time. Many uses recognized as public now were not thought so some years ago. We think the use here claimed as public is, within the meaning of the law of eminent domain, private. Considerable is made of the requirement of compensation, the provision for getting which, it may be remarked in passing, is made studiously difficult, but without a public use a provision for compensation is unimportant.

Numerous helpful briefs have been filed by counsel not appearing for the parties to the record but representing those having interests which will be affected by the decision. They have had attentive consideration. We have not mentioned all of the questions argued. Whether aside from the want of a public use there is anything in this ingeniously drastic

statute which makes it invalid we do not inquire and our decision is limited to the precise facts before us. A condemnation against an apartment house is not for a public use.

Judgment affirmed.

HOLT, J. (dissenting).

I dissent. General or public welfare is a legitimate field for legislative activity. The legislature, in the first instance, must ascertain and determine what makes for public welfare in enacting laws designed to secure or promote the same. Courts should not lightly set aside such determination.

Reference need only be made to a few of the many existing conditions which would seem to justify the law here questioned. People are crowding into cities where the individual ownership of land is restricted to small parcels. This calls for a delicate observance and application of the rule *sic utere tuo ut alienum non laedas*. Courts often use that rule to prevent or redress an injury. And why may not the legislature do likewise when occasion arises? A person buys a 30 or 40 foot lot in a residence district and erects a modest building for a home. Later others secure two or more lots on each side of him and proceed to erect three or more story apartments or business buildings, placing the structures clear up to the lot lines. Is there any doubt but that the small home first built is utterly destroyed so far as comfortable enjoyment goes and its value almost entirely obliterated? We also know how often the unrestricted use of city lots serves as a means of extortion for the unscrupulous speculator who buys a lot in a desirable residence neighborhood, and then threatens to erect a structure which in appearance, or in the use for which it is designed, will greatly depreciate the surrounding property and be an eyesore to the occupants or owners thereof. To avoid the threatened loss and annoyance, the neighbors are forced to buy the lot at the exorbitant price fixed, or submit to the injury. It seems to me that public welfare is clearly served when communities who desire protection against wrongs and inconveniences of the kind suggested may secure the same. That which is appropriated for public welfare is taken for public use. That the right appropriated under this law may be en-

joyed in full only by a limited district or community does not prove that it is not for public use.

It is about time that courts recognize the aesthetic as a factor in the affairs of life. Who will dispute that the general welfare of dwellers in our congested cities is promoted if they be allowed to have their homes in fit and harmonious or beautiful surroundings? Besides preserving and enhancing values it fosters contentment, creates a wholesome civic pride, and is productive of better citizens. City planning by which mercantile and industrial establishments, hotels, apartments, and the individual homes are segregated seems to me to be a public need that should invite the hearty co-operation of all the governmental departments. When property rights are taken or effected for this object there is a taking for a public use. The legislature so deemed it. Its judgment should be respected by the courts. There is nothing in the Constitution, Federal or state, which compels a holding that the taking authorized by this statute is not for public use.

That compensation is provided for the private interests affected by the establishment of restricted building districts, cannot tend to invalidate the law. It must have the contrary effect, for thereby is removed the chief objection that an owner can have against interference with the use of his property. The compensation part of the statute might have been more attractive had there been given an opportunity to secure an award from a jury. But the one provided was held constitutional by this court as long ago as in *Ames v. Lake Superior & Miss. R. Co.* 21 Minn. 241.

HALLAM, J. (dissenting).

I concur with Justice Holt.

After reargument the following opinions were filed January 23, 1920:

HOLT, J.

Mandamus on relation of the Twin City Building & Improvement Company against James G. Houghton, inspector of buildings of Minneapolis, to require him to issue it a building permit. There was an answer to the alternative writ to which a demurrer was sustained, and judgment was then entered for the relator, from which the defendant appeals.

The only question is upon the constitutionality of Laws 1915, p. 180,

c. 128. The relator claims that the statute is unconstitutional, because its subject is not expressed in its title, and because the use for which it is proposed to exercise the power of eminent domain is not a public use.

1. The act is entitled: "An act authorizing cities of the first class to designate and establish restricted residence districts and to prohibit the erection, alteration and repair of buildings thereon for certain prohibited purposes." It provides for establishing restricted residence districts by condemnation. The claim of the relator is that the subject of the act is not expressed in its title within the constitutional requirement. Const. art. 4, § 27. We have given this matter consideration and reach the conclusion that the subject of the act is sufficiently expressed in its title. The matter has been gone over frequently and the question does not call for discussion. Dunnell, Minn. Dig. and 1916 Supp. § 8906, et seq.

2. The remaining question is whether there is any public use in aid of which the right of eminent domain may be used.

On March 8, 1918, the city council passed a resolution pursuant to Laws 1915, p. 180, c. 128, designating block 8 in J. T. Blaisdell's Revised Addition of Minneapolis as a restricted residence district. The relator owns lot 13 and the south 34.9 feet of lot 12 in this block. It was proposing to erect a three-story apartment building costing approximately \$50,000, and for this building a permit for certain parts of the structure was asked and denied. Laws 1915, p. 180, c. 128, provide for the designation by the common council of restricted residence districts and the prohibition of the erection therein of buildings of a certain class, including such as the apartment building intended by the relator. Sections 1 and 2 of the statute, important here, are as follows:

Section 1. Any city of the first class may, through its council, upon petition of fifty (50) per cent of the owners of the real estate in the district sought to be affected, designate and establish by proceedings hereunder restricted residence districts within its limits wherein no building or other structure shall thereafter be erected, altered or repaired for any of the following purposes, to-wit, hotels, restaurants, eating houses, mercantile business, stores, factories, warehouses, printing establishments, tailor shops, coal yards, ice houses, blacksmith shops, repair shops, paint shops, bakeries, dyeing, cleaning and laundering establishments, bill-

boards and other advertising devices, public garages, public stables, apartment houses, tenement houses, flat buildings, any other building or structure for purposes similar to the foregoing. Public garages and public stables shall include those, and only those, operated for gain.

Nothing herein contained shall be construed to exclude double residences or duplex houses, so-called, schools, churches, or signs advertising for rent or sale the property only on which they are placed.

No building or structure erected after the creation of such district shall be used for any purpose for which its erection shall be prohibited hereunder.

The term "council" in this act shall mean the chief governing body of the city by whatever name called.

Section 2. The council shall first designate the restricted residence district, and shall have the power to acquire by eminent domain the right to exercise the powers granted by this act by proceedings hereinafter defined, and when such proceedings shall have been completed the right to exercise such powers shall be vested in the city.

The Constitution provides that "private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured." Const. art. 1, § 13. The parties agree that the only question involved, the question of the title aside, is the constitutionality of the statute under the eminent domain provision of the Constitution. That question is the single question whether the legislature may authorize a common council to establish by condemnation a restricted residence district, which shall exclude apartment buildings, and that question is whether there is a public use in such restriction.

That the public gets no physical use of the premises condemned is clear. It cannot travel upon or occupy them. The use acquired so far as the general public is concerned is rather negative in character, except, perhaps, that its sense of the appropriate and harmonious will not be offended by the erection in the condemned district of proscribed buildings. The condemnation does not take any part of the ground away from the owner; the taking consists in restricting its use. He is compensated for the restriction imposed, but compensation is merely an incident to the

exercise of the right of condemnation, and without a public use to be served gives no right.

Naturally enough we do not find parallel cases. It is not supposed that a considerable portion of the public will derive benefit from the restriction. This is evidenced by the requirement that the condemnation money ultimately be paid from assessments for benefits to the restricted district, which in this case is one block. It is not paid out of the general fund, though the city's credit is pledged for it. It is treated much as a local benefit or use; but this fact, or the fact that only a small part of the public is appreciably or directly benefited does not make the use not public. 10 R. C. L. p. 31. "In holding a use to be public, it has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in the improvement or enterprise." *Sisson v. Supervisors*, 128 Iowa, 442, 104 N. W. 454, 70 L.R.A. 440.

The notion of what is public use changes from time to time. Public use expands with the new needs created by the advance of civilization and the modern tendency of the people to crowd into large cities. Such a taking as here proposed could not possibly have been thought a taking for public use at the time of the adoption of our Constitution when the state was practically a wilderness without a single city worthy of the name. "The term 'public use' is flexible, and cannot be limited to the public use known at the time of the forming of the Constitution." *Stewart v. Great Northern Ry. Co.* 65 Minn. 515, 68 N. W. 208, 33 L.R.A. 427. What constitutes a public use at the time it is sought to exercise the power of eminent domain is the test. The Constitution is as it was when adopted, but, when it employs terms which change in definition as conditions change, it refers to them in the sense in which they are meant when the protection of the Constitution is sought. The Constitution of this state nowhere attempts to define what may be a public use, nor does it prohibit the legislature from determining what shall be deemed such a use.

In comparatively recent times it was questioned whether a public use extended so far as to justify the condemnation of property and the expenditure of money for public parks, or for boulevards, or for pleasure drives, or for public baths, or for playgrounds, or for libraries and muse-

ums or for numerous other purposes which contribute to the general good. Now condemnation and expenditure for these and like or similar purposes is common, and recognized as lawful. Not so very long ago there would have been a revolt against restricting a property owner in the full use of his lot to the street line. But a condemnation for the purpose of widening a street by adding a strip on each side which is not to be used for travel, but for ornament and beauty, and with the reservation of a limited use in the owner, is held valid. In *re City of New York*, 57 App. Div. 166, affirmed in 167 N. Y. 624, 60 N. E. 1108. The taking of land used as a stone quarry along the Palisades of the Hudson, for the purpose of preserving the scenic beauty of the river and of the park, has been sustained as a taking for public use. *Bunyan v. Commissioners*, 167 App. Div. 457, 153 N. Y. Supp. 622. A case often cited is *Attorney General v. Williams*, 174 Mass. 476, 55 N. E. 77, 47 L.R.A. 314, where a statute limiting the height of buildings about Copley Square, on compensation paid, was sustained. And condemnation was sustained for preserving and improving and ornamenting the battle-field of Gettysburg. *United States v. Gettysburg Ele. Ry.* 160 U. S. 668, 16 Sup. Ct. 427, 40 L. ed. 576. The condemnation was thought clearly for a public use.

In the prevailing and dissenting opinions in *State v. Houghton*, 134 Minn. 226, 158 N. W. 1017, L.R.A. 1917F, 1050, where the question was upon the propriety of the exclusion of a store from a restricted residence district under the police power, there was a thorough examination of the authorities, many of which are of value here, but they do not call for reconsideration. The right to restrict under the police power without compensation, and to restrict by condemnation with compensation, differ, but have much in common. It is likely that many of the businesses and buildings referred to in the statute could be excluded under the police power. It is unnecessary to cite or discuss authorities at length, but the following may be noted: *Nichols*, Em. Dom. §§ 40, 58, 100, 101; 1 *Lewis*, Em. Dom. § 271, et seq.; 2 *Dillon*, Mun. Corp. § 695; 10 *R. C. L.* 36; 4 *McQuillin*, Mun. Corp. § 1485, et seq.; 20 *Harvard Law R.* 35; 27 *Harvard Law R.* 665; 15 *Michigan Law R.* 75; 1 *Minn. Law R.* 489.

The tendency is in the direction of extending the power of restriction, either through the exercise of the police power or the exercise of the right

of eminent domain, in aid of the so-called city planning or the improvement of housing conditions. Our elaborate Housing Code of 1917 is an illustration of an effort on the part of the state, through the exercise of the police power, to so regulate the construction of buildings that living conditions shall be better. Chapter 137, p. 185, Laws 1917. The tendency is also illustrated by such decisions as *State v. Houghton*, 142 Minn. 28, 170 N. W. 853, where we held that the exclusion of a factory, manufacturing cereal products, from a residence district, was sustainable under the police power, although the district was sparsely settled, and of the ordinary class of dwellings, and though the property was naturally suited for the use of such a factory, located as it was on a railway line.

The expression is often found in the decisions that whether a use is public is a judicial question. No doubt it needs be where the legislature has not attempted to designate or define the public use for which condemnation is sought. Justice Mitchell, in *Fairchild v. City of St. Paul*, 46 Minn. 540, 49 N. W. 325, in speaking of the limitation upon the power of eminent domain, said: "Of course, there is the further limitation, necessarily implied, that the use shall be a public one; upon which question the determination of the legislature is not conclusive upon the courts." This implies that in the first instance the legislature may designate what is a public use for which condemnation can be exercised. "The question as it presents itself to the courts is not whether the use is public, but whether the legislature might reasonably have considered it public. The presumption is that a use is public if the legislature has declared it to be such, and the decision of the legislature must be treated with consideration due to a co-ordinate department of the government of the state." 10 R. C. L. pp. 29, 30, and, among the cases there cited, we find Justice Marshall, in *Chicago & N. W. Ry. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 56 L.R.A. 240, 88 Am. St. 918, conceding that "the right to declare what shall be deemed a public use" being "vested primarily in the legislature." In *Bankhead v. Brown*, 25 Iowa, 540, Justice Dillon said: "If a public use be declared by the legislature, the courts will hold the use public, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and prosecute such public use."

Instead of it manifestly appearing that the legislature has authorized

the taking for a use not public, by the law in question, we think good reason exists for saying that the restrictions which may be imposed upon the owner of property, under the provisions of the act, constitute a taking for a public use. That the act unmistakably implies that the taking, or the restricting, is deemed to be for a public use is clear from the fact that condemnation is the means employed to achieve the end in view. No one will gainsay that the chief aim of all legislation is the general good, or public welfare. Legislators must ascertain and determine what makes for public welfare, in order to enact laws designed to promote and secure the same.

Many reasons might be suggested as sufficient for the adoption of this statute. We will mention but one or two.

It must be admitted that owners of land in congested cities have of late, through selfish and unworthy motives, put it to such use that serious inconvenience and loss results to other landowners in the neighborhood. In large cities, where the lots for residences must necessarily be of the minimum size, especially where the man of small means must dwell, it is readily seen that if a home is built on such a lot and thereafter three-story apartments extending to the lot line are constructed on both sides of the home it becomes almost unlivable and its value utterly destroyed. Not only that, but the construction of such apartments or other like buildings in a territory of individual homes depreciates very much the values in the whole territory. The loss is not only to the owners, but to the state and municipality by reason of the diminished taxes resulting from diminished values.

The absence of restrictions of use also gives occasion for extortion. The occurrences have been common in our large cities of unscrupulous and designing persons securing lots in desirable residential districts, and then passing the word that an apartment or other objectionable structure is to be erected thereon. In order to protect themselves against heavy loss and bitter annoyance the adjacent owners, or parties interested in property in the neighborhood, are forced to buy the lots so held at exorbitant price. The well-to-do may in this way be able by financial sacrifice to protect their homes against undesirable invasions. But when this occurs in territory occupied by people of modest homes and moderate means, where all they have is represented by the home and that, perhaps, not

free of mortgage lien, there is nothing to do but to submit to the loss and the injustice. There should be a lawful way to forestall such wrongs. Courts have often resorted to the rule *sic utere tuo alienum non laedas* in administering justice between property owners. Why should not the legislature also make use of this rule?

Another reason is that giving the people a means to secure for that portion of a city, wherein they establish their homes, fit and harmonious surroundings promotes contentment, induces further efforts to enhance the appearance and value of the home, fosters civic pride and thus tends to produce a better type of citizen. It is time that courts recognized the aesthetic as a factor in life. Beauty and fitness enhance values in public and private structures. But it is not sufficient that the building is fit and proper, standing alone, it should also fit in with surrounding structures to some degree. People are beginning to realize this more than before and are calling for city planning, by which the individual homes may be segregated from not only industrial and mercantile districts, but also from the districts devoted to hotels and apartments. The act in question responds to this call and should be deemed to provide for a taking for a public use. In *Commonwealth v. Boston Adv. Co.* 188 Mass. 348, 74 N. E. 601, 69 L.R.A. 817, 108 Am. St. 494, is this language: "We agree that the promotion of the pleasure of the people is a public purpose for which public money may be used and taxes laid, even if the pleasure is secured merely by delighting one of the senses." There it was sought to prevent bill-boards on private property adjoining parks, but the court held it could not be done without compensation. The inference from the reasoning is that the law authorizing the rule prohibiting the bill-boards would have been sustained had the restriction upon the owner's use been acquired by condemnation.

Closely analogous to this law is the drainage act, which was upheld in *Lien v. Board of Co. Commrs. of Norman County*, 80 Minn. 58, 82 N. W. 1094. It was there stated that all courts sustained such laws "when enacted in the interest of the public health, convenience or welfare." That act left the county commissioners to determine whether the proposed drainage would be "of public utility, or conducive to public health, or of public benefit or convenience." Many of the drainage projects established under this law have no direct effect on the public at large. In

many cases the public acquires no more right to pass over or to occupy any part of the land of the drainage system than the public, as such, does under the taking in the act under consideration. The direct benefits are to the individuals owning the land comprising the drainage district, the same as to the owners of lots in the restricted building district. The public health proposition is really of no more actual consequence in the one than in the other. We think there is a public use served by the taking authorized by chapter 128, p. 180, Laws of 1915. It does not seem to impinge any inhibition of state or Federal Constitution.

Given a public use, the propriety and necessity of the taking and the mode prescribed for the compensation are for the legislature. *State v. District Court of Fourth Judicial District*, 133 Minn. 221, 158 N. W. 240. We are concerned only with the question of the constitutionality of the statute as against the two objections urged and above disposed of. There may be some provisions in the act which permit of an oppressive use, under certain conditions, but we are not interested in them at present. The method of compensation might have been more attractive had it afforded the right to a jury award. But the one provided was held constitutional as long ago as in *Ames v. Lake Superior & M. R. Co.* 21 Minn. 241.

The former opinion rendered herein is overruled.

The judgment is reversed.

BROWN, C. J. and DIBELL, J. (dissenting).

We adhere to the views expressed in the former opinion.

The reargument brings nothing of moment that is new. It cannot be successfully urged that there is a public use upon which to rest a condemnation, which will prevent an owner from building upon his private property an apartment, upon the sole claim, assumed to be well founded, that his building deteriorates property values in the vicinity. If this is so the owner of vacant land may be restricted in its improvement to such a use as leaves values stationary or enhances them. The suggestion that a condemnation such as is sought can be supported to prevent extortion we cannot accept as sound. No public use can be found and condemnation money is not paid as tribute. Nor unless the prevailing opinion changes the law of the state can it be rightly said that the question

whether a use is a public use is not strictly a judicial one. *Dunnell*, Minn. Dig. and 1916 Supp. § 3027.

The maxim, *sic utere tuo ut alienum non laedas*, quoted in the prevailing opinion, is not a foundation principle of eminent domain. It finds application in the exercise of the police power under which restrictions are imposed without compensation, and it states a principle which we apply in controversies between conflicting private owners. Under the police power, with some reference to this principle, we support restrictions upon the use of private property in a way substantially interfering with the rightful enjoyment by another of his private property. *State v. Houghton*, 142 Minn. 28, 170 N. W. 853, where a cereal factory, the conduct of which substantially annoyed the residents of the community because of noise and dust, was excluded, is an illustration. And in a controversy between private parties, and without a resort to the police power, we restrict the use of private property when it brings substantial physical discomfort to residents of the community, as when it is used for a stone quarry or for stabling purposes. *Brede v. Minn. Crushed Stone Co.* 143 Minn. 374, 173 N. W. 805; *Lynch v. Shiely*, 131 Minn. 346, 155 N. W. 390.

However far we follow the arguments we return to the question whether a residence district, voluntarily organized under legislative authorization upon a 50 per cent vote, may exclude from its midst apartment buildings, which are thoroughly sanitary and which furnish satisfactory dwelling places to large numbers of our people who either cannot live or do not choose to live in detached dwellings with more or less commodious grounds surrounding. If there may be such an exclusion there may be a like exclusion of an unsightly cottage, which is the only possible home the owner of the land can build or have, whenever it is displeasing to the composite good taste of the community; and by a like exclusion the architectural fashion of a community may be fixed. Back of all the suggestion of aesthetic considerations, and potent in urging the result here sought to be attained, is the disinclination of the exclusive district to have in its midst those who dwell in apartments. It matters not how mentally fit or how morally correct or how decorous in conduct they are; they are unwelcome. The exclusive district is unwilling to battle with the economic law which changes the character of residence districts as

time goes, or the natural instinct which prompts flat-dwellers to seek agreeable surroundings; and so it asks the exercise in its behalf of the state's power of eminent domain. It is the same feeling which often finds expression in the making of distinctions based on race or nationality or upon natural or artificial social status. All talk of beautifying parks and public squares and boulevards and establishing playgrounds is quite beside the present discussion. No one questions the public use which justifies condemnation and taxation for them. This court readily gives relief, in a proper case, to a private owner whose right to the enjoyment of his property is interfered with by another private owner not using his own with a just regard to the enjoyment of his neighbor, but it has not given effect to class distinctions imposed by law.

In conclusion, and without further discussion, our judgment is that the present decision is without constitutional basis for its support, and is directly opposed to the fundamental principle that one may use and enjoy his property as best suits his convenience, so long as no unnecessary injury is done to his neighbor. The statute in question is aimed in the wrong direction, and not in promotion of the general welfare, as that term for many years has been understood and applied by the courts. The intelligent thought of the day notes with some concern the increasing unrest and discontent with the trend of our civil affairs, prevalent among the people not only of this state and nation, but the world over. Yet that same intelligence, apparently without thought or reflection, at the same time demands the enactment and enforcement of laws, the only tendency of which is to add to and accentuate in a measure conditions made the basis of such discontent—legislation, like the statute here involved, which in effect segregates the people into classes founded on invidious distinctions, extending to one thereof by positive law the powerful eminent domain arm of the state, by which one class may, on aesthetic or fanciful grounds, exclude from their selected neighborhood members of the other classes, and thus deprive them arbitrarily of the free enjoyment of their property, although they may be of equal intelligence and moral standing with those thus temporarily vested with the use of that powerful state weapon. Heretofore the people in this country have been permitted to work out their own social relations unaided by direct legislation. And those who are willing to take cognizance for the moment of the history

of civil governments and of the reasons for the downfall of many of them cannot but be impressed that the general welfare will best be promoted by a continuance of that method of regulating matters of that kind. This case, briefed favorably to the result by both lawyers and editors, will create no disturbance nor attract any special attention. The statute which is sustained is but a straw indicating a drifting from constitutional moorings toward class distinctions created and fostered by law.

HYDRAULIC PRESS BRICK COMPANY v. MORTGAGE LAND
INVESTMENT COMPANY AND OTHERS.¹

June 27, 1919.

No. 21,305.

Mechanic's lien — price of material — finding sustained by evidence.

1. In an action to enforce a mechanic's lien the evidence is held to sustain a finding that certain materials were furnished on the basis of reasonable value and not at a price fixed by special contract.

Same — acceptance of material.

2. The evidence sustains a finding that certain boilers and fixtures were accepted and were substantially of the character sold.

Same — lien not avoided by excessive demand.

3. The evidence did not require a finding that the lien claimant in his statement "knowingly demanded in such statement more than is justly due" and thereby was deprived by G. S. 1913, § 7085, of a lien.

Consolidated action in the district court for Hennepin county to foreclose a mechanic's lien. The National Manufacturing & Supply Company, and its trustee, the Engler Lumber Company, and John F. Wilcox Company, were made defendants. Defendant manufacturing and supply company interposed a counterclaim against the Mortgage Land Investment Company for a balance of \$7,638.20. The case was tried before Steele, J., who made findings and as conclusions of law found that the trustee of the manufacturing and supply company was entitled to judgment against the land investment company for \$6,099.20; also \$250 attorneys' fees. The land investment company's motion to set aside the

¹Reported in 173 N. W. 849.

findings and conclusions, insofar as they affected the claim of the National Manufacturing & Supply Company, was denied. From an order denying its motion for a new trial, defendant Mortgage Land Investment Company appealed. Affirmed.

Charles B. Elliott, for appellant.

Daniel Carmichael, for respondent.

DIBELL, J.

Action to foreclose a mechanic's lien. The defendant Mortgage Land Investment Company is the landowner. The defendant Glenn is the trustee of the National Manufacturing & Supply Company and is a lien claiming defendant. The controversy is between the trustee and the landowner. There was judgment for the trustee. The Mortgage Land Investment Company appeals from the judgment and from an order denying a new trial.

There are three questions:

(1) Whether the materials were furnished by the trustee on the basis of their reasonable value, as he claims, or at a fixed price, as claimed by the investment company.

(2) Whether there were defects in certain of the materials furnished for which an allowance should have been made.

(3) Whether the lien claimant in the lien filed knowingly demanded more than was due so that he is precluded by G. S. 1913, § 7085, from having a lien.

Upon all points the trial court found against the owner.

1. The materials furnished were plumbing and heating materials and the like for a set of flat buildings in Minneapolis. They were furnished from September 13, 1915, to February 12, 1917. The landowner claims that upon October 4, 1915, the trustee agreed in writing to furnish the materials "at prices of today provided we get all the business. A discount of 3 per cent allowed on total business." This agreement was signed by the accountant and credit man of the trustee. The court found that the materials were furnished at their reasonable value and therefore not under a contract for a fixed price.

It seems that such a contract as is claimed by the owner made in a time of rising prices, was an unlikely one. It fairly appears, or at least

the court was justified in finding, that it was not called to the attention of the trustee, or anyone connected with him, until at the trial. The accountant and the investment company were on close terms. The conduct of the parties in the furnishing of the materials, and making of invoices and statements at reasonable value prices, to which no objection was made, was consistent with a furnishing on the basis of reasonable value when delivered, and somewhat inconsistent with a contract at a price by values when the building was commenced. The finding that the contract under which the materials were furnished was on the basis of reasonable value is satisfactorily sustained.

2. The owner claims that three boilers and certain fixtures and appliances of the toilet rooms were defective. The court found not. The boilers were installed and used by the owner and the evidence is satisfactory enough that the defendant knew what boilers it was getting, and accepted them. There is evidence that it did not properly install them.

The finding covering the toilet fixtures and appliances is less well supported. The evidence justified a reduction for defects. A reduction might well enough have been made. Still there was evidence in support of a finding that they were substantially of the character sold. We have gone over the evidence with very great care. Upon mature consideration we reach the conclusion that the question was for the trial court and that the finding must stand.

3. The statute provides that a lien shall not exist "for any amount whatever, if it be made to appear that the claimant has knowingly demanded in such statement more than is justly due." G. S. 1913, § 7085. The total amount of the claim as filed was \$25,137.45, on which \$17,500 was paid. The true amount of the original claim was \$23,599.20, leaving the amount claimed \$1,538.25 in excess of the true amount. The court found that "this inaccuracy in the lien statement was due to excusable mistake and oversight and the lien claimant did not knowingly demand more than was justly due the said lien claimant." The statute means what it says and the court has no hesitancy in giving it effect. *Lyons v. Westerdahl*, 128 Minn. 288, 150 N. W. 1083, and cases cited. The item of \$1,538.25 apparently went into another building and was

mistakenly carried on the books in the account against the owner. The court's finding is well sustained.

Judgment and order affirmed.

On January 23, 1920, the following opinion was filed:

PER CURIAM.

On the application of the appellant a rehearing was granted. We have reconsidered the questions involved in the light of the additional briefs filed and are of the opinion that the case was rightly decided. We adhere to our former decision and the order from which the appeal is taken stands affirmed.

WILLIAM DALRYMPLE v. RANDALL, GEE & MITCHELL
COMPANY AND ANOTHER.¹

October 24, 1919.

No. 21,116.

Sale for cash — conditional delivery.

1. Where a sale is for cash, payment and delivery are concurrent and mutually dependent acts, and, if the vendor makes delivery in expectation of immediate payment, such delivery is conditional only and he may reclaim his goods if payment be not made.

Presumption that sale is for cash, when.

2. A sale is presumed to be for cash in the absence of evidence indicating that credit is to be given.

Sale on Chamber of Commerce.

3. Sales made on the Minneapolis Chamber of Commerce are governed by the rules and customs of the chamber.

Sale and resale of carload of grain on track — finding — evidence.

4. Under these rules grain on track sold in carload lots is to be weighed by the state weigher at the time it is unloaded and is to be paid for before two o'clock of the day on which such weights are given out. Plaintiff sold a carload of grain on the floor of the chamber to R. J. Johnstone, who immediately resold it to a third party who again resold it.

¹Reported in 174 N. W. 520.

It was switched to an elevator where it was unloaded, weighed and mixed with other grain. Johnstone failed to pay at the prescribed time, and on the same day plaintiff notified Johnstone's vendee, who then had the proceeds of the grain, that the grain not having been paid for belonged to him. *Held* that the finding of the trial court that the sale was for cash, that delivery of the grain was conditional on payment, that the condition had not been waived, and that plaintiff remained owner of the grain and entitled to its proceeds is sustained by the evidence.

Action in the district court for Hennepin county to recover \$1,232.84. The facts are stated in the opinion. The case was tried before Molyneaux, J., who made findings and ordered judgment in favor of defendant Furber. Plaintiff's motion for amended findings of fact and conclusions was granted and the court found in favor of plaintiff. Defendant Furber's motion to strike out the amended findings and conclusions of law, or for a new trial, was denied. From the judgment entered pursuant to the amended order for judgment, the trustee in bankruptcy appealed. Affirmed.

Kerr, Fowler, Schmitt & Furber, for appellant.

H. V. Mercer & Co. and C. G. Krause, for respondent.

TAYLOR, C.

Plaintiff sold a carload of grain on track in the city of Minneapolis to R. J. Johnstone who was then insolvent, but this fact was not known to plaintiff. Johnstone immediately resold the grain to the Randall, Gee & Mitchell Company, who in turn immediately resold it to the Cereal Grading Company, which unloaded the grain two days later and commingled it with other grain. The above parties were all members of the Minneapolis Chamber of Commerce, and the above sales were all made on the exchange floor of the chamber on March 3, 1915, and were made under and according to, and are governed by, the rules, regulations and customs of the chamber. Johnstone failed to pay for the grain and was subsequently adjudged an involuntary bankrupt and a trustee in bankruptcy was appointed of his estate. The Randall, Gee & Mitchell Company did not pay for the grain, but received full payment therefor from the Cereal Grading Company. The grain having been

commingled with other grain so that it could not be identified, plaintiff brought this action to recover its proceeds from the Randall, Gee & Mitchell Company and made the trustee in bankruptcy a party defendant. The Randall, Gee & Mitchell Company admitted having the proceeds of the grain and that such proceeds belonged either to plaintiff or the trustee, and, under and pursuant to a stipulation, paid the same into court and was released from further liability. The case was tried before the court without a jury with the trustee in bankruptcy as the sole defendant. The court found as a fact that title to the grain had never passed to Johnstone and rendered judgment awarding its proceeds to plaintiff. The trustee appealed.

It may be noted at the outset that the controversy is wholly between plaintiff as vendor and the trustee in bankruptcy of his insolvent vendee, and that no rights of the subvendees are here involved.

Appellant contends that the evidence does not sustain the finding that plaintiff remained owner of the grain or its proceeds, but shows conclusively that title to the grain had passed to Johnstone and that its proceeds belong to his estate.

The grain had been consigned to plaintiff for sale by the Wing Farmers Co-operative Association of Wing, North Dakota, and on March 3 was on track in Minneapolis. As was customary among members of the Chamber of Commerce, plaintiff sold the grain as his own, without disclosing his principal or that he was acting as agent. Before bringing this action he paid the consignors for the grain and received an assignment from them of all their interest in both the grain and its proceeds.

Where a sale is for cash, payment and delivery are concurrent and mutually dependent acts, and, if the vendor makes delivery in expectation of immediate payment, such delivery is conditional only, and he may reclaim his goods if payment be not made. *Fishback v. G. W. Van Dusen & Co.* 33 Minn. 111, 22 N. W. 244; *Globe Milling Co. v. Minneapolis Ele. Co.* 44 Minn. 153, 46 N. W. 306; *National Bank of Commerce v. Chicago, B. & N. R. Co.* 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. 566; *Freeman v. Kraemer*, 63 Minn. 242, 65 N. W. 455; *Carter, Rice & Co. v. Cream of Wheat Co.* 73 Minn. 315,

76 N. W. 55; *E. L. Welch Co. v. Lahart Ele. Co.* 122 Minn. 432, 142 N. W. 828.

In the absence of evidence indicating that credit is to be given, a sale is presumed to be for cash. *Globe Milling Co. v. Minneapolis Ele. Co.* 44 Minn. 153, 46 N. W. 306.

From the rules and practices of the Chamber of Commerce it appears that sales of grain on the floor of the chamber in carload lots on track are made to state weights; that the purchaser is to designate the disposition to be made of the car; that the grain is to be weighed and the quantity ascertained by the state weighers at the time the car is unloaded; that each morning the state weighers give out the weights of the several cars unloaded the preceding day; that the seller is to present an invoice or bill to the buyer before eleven o'clock a. m. of the day on which the weight is given out; that the buyer is required to make payment before two o'clock p. m. of the same day, and that such sales are understood to be cash sales.

The transactions in controversy followed the usual routine above outlined. Shortly after his purchase Johnstone informed plaintiff that he had resold the grain to the Randall, Gee & Mitchell Company, and requested plaintiff to deliver the car at elevator L. Thereupon plaintiff directed the railway company to deliver the car at that elevator. Thereafter the railway company switched the car to elevator L, where it was unloaded and the grain weighed on March 5. The weights were given out by the state weigher on the morning of March 6, and plaintiff promptly sent a bill for the grain to Johnstone. At the same time the Randall, Gee & Mitchell Company sent a bill for it to the Cereal Grading Company to whom they had resold it. This bill was paid at once. Shortly after sending the bill to Johnstone plaintiff learned that Johnstone was in financial difficulties and unable to make payment, and forthwith notified the Randall, Gee & Mitchell Company that the grain, not having been paid for by Johnstone, belonged to him, and to hold the proceeds until released by him. The Randall, Gee and Mitchell Company received this notice on March 6. They had already received payment from the Cereal Grading Company who had possession of the grain and had commingled it with other grain. In consequence of plaintiff's notice,

the Randall, Gee and Mitchell Company withheld payment for the grain and subsequently paid its proceeds into court as hereinbefore stated.

Among other things the court found in effect that plaintiff sold the grain for cash; that the delivery made was conditional upon immediate payment as soon as the quantity was ascertained; that plaintiff had not waived this condition nor divested himself of title, and that he was entitled to recover the grain or its proceeds. In our opinion the evidence amply justified the conclusion of the court. *Globe Milling Co. v. Minneapolis Ele. Co.* 44 Minn. 153, 46 N. W. 306; *National Bank of Commerce v. Chicago, B. & N. R. Co.* 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. 566; *E. L. Welch Co. v. Lahart Ele. Co.* 109 Minn. 219, 123 N. W. 821.

Appellant cites *E. L. Welch Co. v. Lahart Elevator Co.* 122 Minn. 432, 142 N. W. 828, as sustaining the contention that the title had passed. The facts in the two cases differ materially. Furthermore in the Welch case the court found as a fact that title had passed, and the question before this court was whether such finding was sustainable under the evidence. The vendor contended that it followed as a matter of law from the undisputed facts in that case that title had not passed. This court held that whether title had passed depended upon whether the parties intended that it should pass, and that the evidence made this a question of fact. In the present case the court found as a fact that it was the understanding and intention of the parties that title should not pass until payment was made as required by the rules of the chamber, and that such payment not having been made the title remained in plaintiff. We find no ground for disturbing this finding, and it is doubtful if a contrary finding could be sustained on the facts of this case.

Plaintiff had the right to reclaim his grain. It had been resold and commingled with other grain and its proceeds were in the hands of a subvendee who admitted holding the same for the rightful owner. Under such circumstances plaintiff clearly had the right to pursue and recover these proceeds instead of attempting to recover the grain or bringing an action for its conversion.

Judgment affirmed.

STATE v. JOHN RICKMIER.¹**October 24, 1919.****No. 21,324.****Indictment — indorsement of witnesses' names.**

1. Where the grand jury in good faith indorsed on the indictment the names of the witnesses, upon whose evidence it is asserted the indictment was found, the indictment will not be set aside because of the claim that other witnesses were examined. It must be conclusively presumed that the indictment was found on the evidence of the witnesses named.

Grand larceny — evidence.

2. The evidence is sufficient to sustain the verdict that the defendant stole property in excess of the value of \$25 and that therefore the crime was grand larceny in the second degree.

Criminal law — circumstantial evidence — charge to jury.

3. In a criminal prosecution founded on circumstantial evidence, except that the state claims an admission of guilt by an offer of the defendant, after indictment, to return the property alleged to have been stolen if the trouble were dropped, all of which is in dispute, the defendant is entitled to a charge on circumstantial evidence.

Defendant was indicted by the grand jury of Waseca county, charged with the crime of grand larceny in the second degree, tried in the district court for that county before Childress, J., who at the close of the testimony denied defendant's motion for a directed verdict and a jury which found him guilty as charged in the indictment. From the order denying his motion for a new trial and from the judgment of conviction, defendant appealed. **Reversed.**

Fred W. Senn and Joseph N. Moonan, for appellant.

Clifford L. Hulton, Attorney General, James E. Markham, Assistant Attorney General, and Henry M. Gallagher, County Attorney, for respondent.

¹Reported in 174 N. W. 529.

DIBELL, J.

The defendant was convicted of grand larceny in the second degree upon an indictment charging him with the stealing of two pigs of the value of \$40, the property of one Deverell, and he appeals.

1. At the foot of the indictment were the names of five witnesses sworn and examined before the grand jury. The defendant moved to set aside the indictment and made a showing that his sister was examined as a witness before the grand jury. Her name was not upon the indictment. The court denied the motion and this ruling is assigned as error. The two sections of G. S. 1913 relevant upon this contention are as follows:

"9132. No indictment shall be found without the concurrence of at least twelve grand jurors. When so found, it shall be indorsed, 'A true bill,' and the indorsement signed by the foreman, whether he be one of the twelve concurring or not. If twelve grand jurors shall not concur in finding an indictment or presentment, the charge shall be dismissed, but such dismissal shall not prevent its being again submitted to a grand jury as often as the court shall direct. When an indictment is found, the names of the witnesses examined before the grand jury shall in all cases be inserted at the foot of the indictment, or indorsed thereon, before it shall be presented to the court."

"9180. The indictment shall be set aside by the court in which the defendant is arraigned, upon his motion, in any of the following cases:

"1. When it shall not be found, indorsed, and presented as prescribed in the subdivision relating to grand juries;

"2. When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon."

The defendant urges that these two statutes together made it mandatory upon the court to set the indictment aside. These statutes have been on the books for many years. They have not often been before this court.

In *State v. Beebe*, 17 Minn. 218 (241), it was held that the affidavit of a grand juror will not be received to impeach the conduct of the grand jury by proving the making of a false indorsement.

In *State v. Hawks*, 56 Minn. 129, 57 N. W. 455, it was held not necessary to indorse the names of witnesses, who, while other charges were

being investigated, may have given evidence material to the charge alleged in the indictment. The court said that the object of the statute was, first, to prevent malicious accusations being made by unknown and secret prosecutors, and, second, that the accused may to some extent be informed what witness he will have to confront at the trial. It was intimated that the omission is one which may be supplied by amendment. The court referred to the "absurdity" of setting aside an indictment on this ground when the very fact of his making such a motion conclusively shows that the defendant already has the very information which the indorsement was designed to furnish him, and it was held that all that the statute requires is that there be indorsed the names of those witnesses who were examined and gave material evidence upon the investigation of the particular charge upon which the indictment was found, and upon whose evidence it was found, and that where the grand jury indorsed only the names of those witnesses who were examined in the investigation of the particular charge against the defendant when it was under consideration "it must be conclusively presumed that the indictment was found exclusively on the evidence of such witnesses."

If there is to be such conclusive presumption in that sort of a case, we see no reason why the same conclusive presumption should not obtain in any case where the names of witnesses are in fact indorsed.

These statutes must be given effect according to their meaning. If the names of no witnesses are indorsed, the statute clearly requires that the indictment be set aside. But suppose 100 witnesses were examined and one was omitted from the indorsement. Is it the intent of this statute that the omission should be fatal to the indictment even though the testimony of the omitted witness was in fact immaterial? Or would the court be required to institute an inquiry to determine the materiality of the evidence of the omitted witness? It seems to us that neither result is contemplated by the statute. In the investigation of a crime many witnesses must of necessity be called who in fact give no consequential testimony. We do not think that the statute means that an indictment is fatally defective where the grand jury in good faith indorses the names of the witnesses whose testimony is considered material and omit the names of immaterial witnesses from the indorsement. Such good faith is always presumed. As held in the Hawks case the statute

requires the indorsement only of the names of material witnesses and when the grand jury in good faith performs this function, and indorses the names of the witnesses upon whose testimony it asserts the indictment was found, "it must be conclusively presumed that the indictment was found exclusively on the evidence of such witnesses."

The views just stated are those of a majority of the court. Justice Quinn and the writer do not concur in them. The argument is made with force, and with authority to support it, that the words "shall in all cases be inserted," in section 9132, requiring the indorsement of the names of the witnesses, are directory, and it is convenient to consider them so; but in their opinion the words, "shall be set aside," in section 9180, stating the result which shall follow from a failure to observe the requirement of section 9132, are a command of the legislature which the courts should obey, and it seems to them that, if the legislature should now seek to express its intent that the indictment should in fact be set aside when the names of witnesses are not in fact indorsed as required, they hardly could use words more apt to express their intent than those which are now held insufficient.

2. We reach the conclusion that the evidence sustains the verdict. Deverell had two red pigs which he kept in a pen on his premises in the outskirts of Waseca. There is evidence tending to prove the following facts: The pen was inclosed with a hog tight woven wire fence. On the afternoon of September 28, 1918, the members of the Deverell family were absent from home. The gate had been left closed. When the family returned in the evening the gate was closed but the pigs were gone. Five weeks later it was discovered that defendant had two red pigs in a pen on his premises a block away. Deverell obtained a search warrant and with the deputy sheriff examined the pigs. He testified that they were his. He said they answered the description of his pigs. In size one was a little larger than the other and this was true of his. He claimed he recognized one by a peculiar scar or ringmark on the nose and said that from seeing them so often he got familiar with their appearance, and, without being able to explain how he could distinguish his own from others of the same kind, he still could do so. The defendant refused at the time of the search to tell where he got the pigs. On the stand he claimed that he bought them from a stranger to him, though he had

seen him before, and who had them crated and in his wagon for sale in town, and who trusted him for a part of the price. He concealed the pigs from his sister, with whom he lived, for a week or more. She insisted on his bringing to her the man from whom he bought them and he claimed that he did so. There is some evidence that he concealed the pigs from others and that he told persons who knew of his having them to tell nobody. There is some evidence, not very satisfactory, that he tried to trade them off to a farmer for other pigs. There is a claim that after the indictment he acceded to a suggestion that he let Deverell have the pigs if the prosecution be stopped. The defendant denied the taking, gave evidence of a purchase of the pigs. He claimed that he had possession of them before September 28, the date of the theft. In this he was corroborated by two or three witnesses. If the pigs were stolen the theft was in daylight and the improbability of such a thing is suggested in behalf of defendant. The defendant denied or offered an explanation of most of the circumstances alleged against him. The identification of the pigs by Deverell is not beyond question. He never chose to assert his ownership by legal proceedings. The defendant kept them and butchered them some five or six weeks after the indictment. The prior record of the defendant was not good and the jury was not required to receive his testimony favorably. The evidence made a question for the jury.

Defendant further claims that it was not shown that the value of the pigs was as much as \$25 when stolen, and therefore a verdict of grand larceny in the second degree could not be found. The evidence is far from satisfactory and so the trial court thought. From an examination of it we think that by patching it together the jury might conclude that the value of the pigs was as much as 17 cents per pound and that their combined weight was as much as 150 to 160 pounds. We cannot say that the finding of the jury upon value is not sustained.

3. The defendant requested the following instructions, which were refused:

"19. I charge you that the evidence upon which the state is seeking to convict the defendant in this case consists largely of what is known in law as 'circumstantial evidence.'

"20. In order to warrant a conviction upon circumstantial evidence it is not alone sufficient that said evidence is consistent with the guilt of defendant but it must exclude every other hypothesis."

Both of these requests were refused and error is claimed. We have mentioned that there was evidence claimed by the state to constitute an admission of guilt and we now recur to it. After the indictment of the defendant he went with the deputy sheriff to the store of one Sterling, a tradesman of the city, to secure him as a bondsman. In his testimony the deputy refers to a talk between the defendant and Sterling, which he did not hear. Then he says:

"When they got through Sterling called me over. He wanted me to go to the county attorney and see if they would not drop the case. said that John offered to give him the pigs back if they would drop it and not have any further trouble about it. John was standing there. I asked him if that was so. He said: 'Yes.'"

Sterling testified:

"I don't know as it was exactly at the time he was in there or it was a little later. I know I tried to persuade John—Mr. Rickmier—to turn those hogs back to Mr. Deverell. I told him I thought it would be easiest way to stop the trouble. He said he wouldn't do it because he had bought the pigs and that would intimate he was guilty. I tried to tell him I thought it was the easiest way out of it.

"Q. You say Mr. Rickmier refused to do it?

"A. Yes, sir.

"Q. At any time in any conversation there with Mr. Rickmier in the presence of Mr. Barden did Mr. Rickmier at any time say he would give any pigs back?

"A. Not to my knowledge.

"Q. Did you hear any such conversation?

"A. When I talked to him I know he said he wouldn't do it.

"Q. Why?

"A. He said they were his; he wouldn't turn them back. I tried to advise him to turn them back. I thought it was the easiest way out of it—out of his trouble."

He declined to swear that the proposition to give Deverell the pigs

was not made, or that the defendant did not accede to some such proposition, but said that he thought not. This is a fair, though not complete, statement of Sterling's testimony. It seems that he was a peacemaker and so far as we can gather from his testimony he was frank. He stated further that Deverell had before indicated a willingness to take the pigs and let the trouble drop.

The defendant, referring to his talk with Sterling, said:

"He says the best way to do—Sterling made this remark himself—he says, the best way to do is to get together and drop it if you can.

"Q. He wanted to save you trouble, did he?

"A. He wanted to save trouble. He said it will save trouble if you can drop it. I says: 'I won't do any such a thing as that. It will prove I stole the pigs if I do.'

"Q. Did you tell him at that time that you bought them?

"A. Yes, sir."

The jury was justified in taking this so-called admission, which the defendant denied making, for what it was worth. It was not a particularly strong circumstance. The case was after all substantially one of circumstantial evidence notwithstanding the talk of a settlement of the trouble after the indictment. An instruction upon circumstantial evidence should have been given. It may well enough be that the circumstantial evidence in a case may be of such minor importance that a charge upon it need not be given. This is not such a case. The instruction need not have been given in the precise words of the request, but the defendant was entitled to have the jury's attention called to the circumstantial nature of the testimony and as to the rule applicable to its consideration. The omission may have been inadvertent but the instruction was distinctly asked.

The views stated are those of a majority of the court. Justice Halam is of the opinion that the refusal was not error. His view is that, where the court charges the jury that guilt must be established beyond a reasonable doubt, a further instruction that the proof must exclude every other hypothesis than that of guilt adds very little of practical value and that probably no juror would recognize a distinction between the two forms of instruction. That some courts have held that failure to give such

instruction is not error, *Brown v. State*, 7 Okla. Cr. 678, 126 Pac. 263; *Jones v. State*, 61 Ark. 88, 32 S. W. 81; *People v. Holden*, 13 Cal. App. 354, 109 Pac. 495; *State v. Lapoint*, 87 Vt. 115, 88 Atl. 523, 47 L.R.A. (N. S.) 717, Ann. Cas. 1916C, 318, and that we should so hold; that in any event when the case is one partially dependent on circumstantial evidence it is proper to state the law on evidence bearing on that question, but that a failure to do so is not error. Thus where there is direct evidence of an admission or confession by defendant an instruction on the law of circumstantial evidence is not necessary. 16 C. J. 1009; *State v. McCord*, 237 Mo. 242, 140 S. W. 885; *Hannigan v. State*, 131 Ala. 29, 31 South. 89; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874; *Villareal v. State*, 80 Tex. Cr. R. 133, 189 S. W. 156. One of the requested instructions recited that the evidence was "largely circumstantial." The evidence of the alleged offer of defendant to give the pigs back "if they would drop it and not have any further trouble about it" was more than circumstantial evidence. It was tantamount to an admission of guilt. It was as clearly an admission as that proved in *State v. McCord*, supra. Defendant himself recognized this when in answer to a question whether he made such an offer he said that he was urged to do so but refused, saying: "It will prove I stole the pigs if I do." For these reasons he is of the opinion that the refusal to give an instruction upon circumstantial evidence was not error which should result in a reversal.

Order reversed.

IN THE MATTER OF GUARDIANSHIP OF CARL A. HALLENBERG, INCOMPETENT.

CARL A. HALLENBERG v. OSCAR HALLENBERG.¹

October 24, 1919.

No. 21,350.

Incompetent — findings supported by evidence.

1. The findings of fact and conclusions of law, to the effect that respondent was of sound mind and entirely capable of caring for his own

¹Reported in 174 N. W. 443.

person and property and should not remain under guardianship, are sustained by the evidence.

No error.

2. No prejudicial error is disclosed in the record.

From an order of the probate court for Clay county, Sharp, J., denying the petition of Carl A. Hallenberg to have the fact of his restoration to capacity judicially determined, petitioner appealed to the district court for that county where the appeal was heard before Roeser, J., who made findings and reversed the order of the probate court. The motion of Oscar Hallenberg for amended findings was denied. From the order denying his motion for a new trial, Oscar Hallenberg, guardian, appealed. Affirmed.

Edgar E. Sharp, for appellant.

N. I. Johnson, for respondent.

HOLT, J.

In March, 1917, Carl A. Hallenberg was adjudged incompetent to care for and manage his property, and his son was appointed guardian of his father's person and estate. Two months thereafter, Hallenberg petitioned the probate court to be adjudged competent. The petition was denied, and he appealed to the district court where, after an exhaustive trial, a decree was entered reversing the probate court and determining that Hallenberg then was and had always been mentally sound and competent to care for his person and property. A motion for amended findings or a new trial was denied. The guardian appeals.

Mr. Hallenberg is now 82 years old. When about 30 years of age he left Sweden with his wife and young child and reached New York with only \$55 on hand. He went to work, saved and accumulated, so that now he is worth about a quarter of a million dollars. Besides, he raised a family of seven children to maturity, all except the oldest receiving a college or professional education. In 1899 his wife died in Moorhead, where the family had resided for many years. A few years later he went to Minneapolis and came in touch with a comparatively young woman whom he married to avoid a breach of promise suit. A

son was born to them. The union was unfortunate. His wife obtained a divorce, and, as permanent alimony, some \$35,000 in money and property, on condition that she support the child, whose custody was awarded her. He returned to Moorhead where he lived with his son Oscar for some time, and then took up his residence in a smaller house that he there erected. He lived alone, except for the housekeepers he employed from time to time. One of these stayed with him over a year, and until she married.

Mr. Hallenberg then advertised in a Swedish periodical for a housekeeper. As the advertisement held out the hope of possible marriage with a housekeeper who might find favor in his eyes and it made no secret of his wealth, he was flooded with applications. Youth and beauty still appeal strongly to him. And, as these qualities do not always go hand in hand with good housekeeping, his selection of a housekeeper was not always happy, and there were frequent changes. Among the applicants may also have been designing women. At any rate, one brought an action against him for assault and recovered a verdict of \$300. In the fall of 1916, he had secured one who suited him so well that he offered to marry her. She was agreeable, and her mother approved the match. As the wedding was about being arranged for, Mr. Hallenberg's sons, evidently fearing a repetition of his last matrimonial venture, and desirous of forestalling further provocations for damage suits, petitioned to have him adjudged incompetent. After a hearing had been partially completed, Mr. Hallenberg was induced to withdraw opposition, and he and his attorney, and the petitioners as well as his two married daughters, signed a stipulation, wherein it was agreed that Oscar should be his father's guardian. But, as above stated, after two months' experience Hallenberg found the guardianship irksome, and again desired to manage his own affairs.

No good purpose would be served by an extended reference to the evidence. It was virtually conceded that Carl A. Hallenberg was as perfectly competent to care for and manage his property now as he ever had been, except for his proneness to give attractive and designing young women an opportunity to enmesh him in marriage or mulct him in damage suits. We do not think the statute governing the appointment of

guardianship for incompetents contemplated that one who is imprudent or indiscreet in his dealings with the opposite sex must be put under guardianship. The evidence does not show that he squandered his means upon the women employed by him or with whom he came in contact; indeed, no specific instance of ordinary generosity even is disclosed by the testimony. The litigation he has had on account of his conduct with women, aside from the divorce suit, has not been of such magnitude that apprehension of what might happen in the future to his estate need be considered. His experience in the second marriage does not prove that a guardian must be appointed. The parties lived together for nine years, and the settlement of their property rights does not indicate waste. It is safe to say that were Hallenberg 40 instead of 80 years old no plausible claim could be made that his disposition and conduct towards women would give a possible excuse for retaining him under guardianship against his wishes.

No doubt it would be the part of wisdom for Mr. Hallenberg to eschew all desire to again enter wedlock, and it is natural that his children should be averse to his doing so, not only on account of what loss it might mean to them as heirs, but also because they feel that an undesirable notoriety attaches to one who marries at that age. But these matters are not controlling upon the proposition whether he is competent to manage his own affairs.

Happily the bitterness which usually characterizes contests of this nature does not appear in the record before us. Mr. Hallenberg displayed no resentment towards his sons for procuring the appointment of a guardian, and clearly the sons did so for the laudable purpose of protecting their father. However, it is readily seen that Mr. Hallenberg, though at first persuaded to consent to be put under guardianship, quickly repented of the act and felt chagrin at being deprived of the control and management of the property he had been so intense in accumulating. And no person in good health and of sound mental powers should be placed in that position without clear proof that, because of the matters enumerated in section 7433, G. S. 1913, he "so spends or wastes his estate as to be likely to expose himself or his family to want or suffering." His family cannot well be exposed to want or suffering from his acts.

His children are all grown and appear to be prosperous in their several stations. He has large means, and it is unlikely that he will ever expose himself to want or suffering because of the waste of his property. He is in excellent health, reads without glasses, and has but slight, if any, impairment of memory or other faculties. He does not of late years use liquor to excess. We think the record so abundantly sustains the finding of competency that we are not warranted in disturbing the decree, unless prejudicial error was made by the court below in the reception or exclusion of testimony.

We have examined the errors assigned upon the rulings during the trial with care, but find none that are deemed so prejudicially erroneous as to entitle to a new trial. The attorney who appeared for Hallenberg when he was adjudged incompetent was called by appellant. The court indicated that the witness would be permitted to state such conversations with his client as were had in the presence of third parties, but not those when he was alone with him. No real effort was made to elicit testimony from the witness in line with what the court stated to be admissible. The court's suggestion was clearly right. Complaint is made because the attorney was not allowed to give his opinion as to whether Hallenberg was of sound mind on the question of women. An answer was excluded on the ground that the question called for expert testimony, and the impropriety of requiring Hallenberg's former attorney to give the requested opinion which must necessarily be based in part upon what the witness had learned in the course of privileged communications. There was no error in the ruling. Nor was there in excluding evidence of certain testimony given by plaintiff in the assault case against Hallenberg, above referred to. The same is also clearly true in respect to excluding testimony of a physician as to consultations with Hallenberg in regard to certain ailments. The only reason sought to sustain its admissibility, in the face of the express provision in the statute to the contrary, was that the physician was the patient's son-in-law and did not expect pay for his services. The application of the rule does not depend upon the services being gratuitous or paid for. Some assignments of error are based on a refusal to make additional findings, but we consider the findings asked for of no controlling value

upon the real issue of competency, which had to be met and was met by a square finding that Hallenberg was of sound mind, entirely capable of taking care of all his property and of his person.

The trial court was exceedingly liberal in permitting introduction of any testimony that might have a bearing upon Hallenberg's competency, and evidently gave the matter careful consideration. The record does not justify this court in setting aside or altering the action of the trial court.

The order is affirmed.

MARIE PLASCH, ADMINISTRATRIX OF THE ESTATE OF
PETER PLASCH, DECEASED v. H. H. FASS
AND ANOTHER.¹

October 24, 1919.

No. 21,860.

Liability of husband for wife's tort — statute.

1. Section 7146, G. S. 1913, declaring the husband not liable for the torts of his wife, abolished the rule of the common law in such cases, but was not intended to include torts committed by the wife while acting as his agent or representative under authority expressly or impliedly conferred upon her.

Same — negligence in operating automobile.

2. The husband is liable for the negligence of his wife in the operation of an automobile furnished by him for the comfort and pleasure of the family, and which he permits her to use for that purpose.

Verdict sustained by evidence.

3. The evidence upon the question of negligence and contributory negligence sufficiently supports the verdict.

Action in the district court for Ramsey county by the administratrix of the estate of Peter Plasch, deceased, to recover \$7,500 for the death of her intestate. The case was tried before Haupt, J., who at the close of the testimony denied the motion of defendants for a directed verdict, and a jury which returned a verdict for \$1,000. From an order

¹Reported in 174 N. W. 438.

denying their motion for judgment notwithstanding the verdict or for a new trial, defendants appealed. Affirmed.

C. D. & R. D. O'Brien, for appellants.

John I. Levin, for respondent.

BROWN, C. J.

Action for the alleged wrongful death of plaintiff's intestate, in which plaintiff had a verdict, and defendants appealed from an order denying their motion for judgment or a new trial.

Defendants are husband and wife. At the time in question the husband owned and kept an automobile exclusively for the pleasure and comfort of himself and members of his family, including his wife, who was permitted to operate and use the same without the special or other express consent of the husband. She was so using the car at the time here in question, was proceeding along University avenue from St. Paul to her home in Minneapolis, and at a point some 50 feet from a street intersection struck decedent, inflicting injuries to him which resulted in his death. The husband was in the state of Montana at the time, and in no way personally concerned or involved in the unfortunate accident. The action is founded upon the alleged negligence of the wife in the operation of the car, and the verdict in plaintiff's favor sustains the allegations of the complaint in that respect.

It is contended by both defendants: (1) That the evidence is wholly insufficient to show actionable negligence in the operation of the automobile; (2) that the evidence conclusively established contributory negligence on the part of decedent, and, by defendant H. H. Fass alone, that, conceding the negligence of Mrs. Fass, her conduct in that behalf constituted a tort for which he is not responsible at law.

1. The first two contentions may be disposed of without a discussion of the evidence. We find in the record ample testimony to sustain the verdict as to the negligence of Mrs. Fass and the alleged contributory negligence of decedent. The accident occurred near the intersection of Mackubin street and University avenue at about two o'clock in the afternoon. A street car, on its way to St. Paul, had stopped after crossing Mackubin street to take on and discharge passengers. A truck of some

kind, not particularly described by the evidence, was standing on the north side of the avenue headed toward Minneapolis, and an ice wagon was crossing the avenue on Mackubin street. The automobile was going west toward Minneapolis, and as it approached Mackubin street turned out to pass the standing truck, the passageway being between the truck and the street car. As the automobile cleared the truck, Mrs. Fass for the first time saw decedent hurriedly crossing the street toward the street car, evidently to take passage thereon. The street was wet and slippery and her efforts to prevent striking decedent resulted in causing the car to skid and decedent was struck down and killed. The testimony of two witnesses, who were in clear view of the situation and of all that occurred at the time, was to the effect that the automobile was being driven at the time at between 25 and 35 miles an hour, an exceedingly dangerous speed in view of the situation presented. Mrs. Fass testified she was going very slow, and in this she was to some extent corroborated. In this state of the evidence, a further elaboration of which would serve no useful purpose, we hold that the question of negligence was one of fact and properly submitted to the jury. The same view is held as to the issue of contributory negligence. Whether decedent saw or could have seen the approaching automobile and the speed thereof, when he attempted to cross the street, is not so clearly shown as to justify this court in overturning the verdict, which has received the approval of the trial court.

2. The substantial question in the case is found in the claim of the husband that the injury complained of was caused by the tort of his wife, for which he is not legally responsible. The question must be answered adversely to his contention. As remarked by Mr. Justice Holt in the case of *Johnson v. Smith*, 143 Minn. 350, 173 N. W. 675, this court is firmly committed to the rule that where the head of a family makes it his business to provide recreation and pleasure for the family and its several members, and to that end furnishes an automobile for their use, he is responsible for its negligent operation by any one of the family having his permission to drive it. The theory and basis of the rule are that the member of the family so permitted to use the automobile is the representative of the head of the family in carry-

ing out his purposes in furnishing the car, for whose negligence in the operation thereof he is responsible. Though there is a divergence of judicial opinion upon the question, based on the absence of the conventional relation of master and servant or principal and agent between the parties, the rule stated is followed and applied as between father and son and father and daughter by a majority of the state jurisdictions as well as by some of the Federal courts. *Berry, Automobiles* (2d ed.) § 653. The authorities are practically all cited in the opinion in the *Johnson* case, *supra*.

We find only a limited number of reported decisions, wherein the liability of the husband for the negligence of the wife has been involved. But it is obvious that the courts, when the question is squarely presented, will apply the rule held by each as to liability for the negligence of a son or daughter. *Tanzer v. Read*, 160 App. Div. 584, 145 N. Y. Supp. 708; *Vannett v. Cole* (N. D.) 170 N. W. 663; *Hutchins v. Haffner*, 63 Colo. 365, L.R.A. 1918A, 1008, 167 Pac. 966. See also as bearing on the question: *Collinson v. Cutter* (Iowa) 170 N. W. 420; *Crawford v. McElhinney*, 171 Iowa, 606, 154 N. W. 310, Ann. Cas. 1917E, 221; *Babbitt, Motor Vehicles*, § 917. In our view of the question no distinction can well be drawn between different members of the family in such cases. The rule of liability should apply equally for the negligence of the wife as for the negligence of the son or daughter. The wife may, as a matter of law, be expressly or impliedly constituted the agent or representative of the husband, except as to his real estate, as well as the child (13 R. C. L. 1177; G. S. 1913, § 7147), and any attempt to differentiate between them can find support only in the contention of counsel for appellant in the case at bar, namely, that under our statute the husband is expressly declared not liable for the torts of the wife, G. S. 1913, § 7146, therefore is exempt from a liability of this kind.

We have given this feature of the case careful attention, and are unable to give to the statute the broad and sweeping effect claimed for it by counsel. The purpose of the statute was to abolish the rule of the common law, by which the husband was made liable for all torts of the wife committed before or during coverture, but it should not be construed to cover and include those committed by her under his express or

implied agency or authority, or those committed by his connivance or instigation. He is, notwithstanding the statute, still liable for the wrongful acts of his wife, committed in the exercise of authority conferred upon her as his agent, on the same principle that any other person is liable for the wrongs of his agent or other legal representative. And it is clear that the legislature did not intend to relieve him from responsibility for torts of the wife thus arising, but only those with which he was not directly or indirectly by operation of law connected. We so construe our statute. 13 R. C. L. 1178; Lush, Husband & Wife, p. 332. This view of the law is directly supported by *Vannett v. Cole*, and *Hutchins v. Haffner*, supra. The statutes of the state of North Dakota expressly provide that neither the husband nor wife shall be liable for the acts of the other. That of course includes the torts of either. Yet in the *Vannett* case the supreme court of that state held the husband liable for the negligence of the wife in the operation of the family automobile. There is no liability on the part of the husband for the torts of the wife in the state of Colorado, but in the *Hutchins* case the court reached the same conclusion of liability as the North Dakota court. Both decisions are in harmony with the general trend of the authorities in analogous cases, and support our conclusion in the case at bar.

Order affirmed.

THE KENYON COMPANY v. LOUIS O. JOHNSON AND
ANOTHER.¹

October 24, 1919.

No. 21,364.

Partnership — contract made by managing partner — liability of another partner.

1. Where one partner, who has exclusive management of the partnership business, makes a contract on behalf of the partnership, the other partner cannot relieve himself from liability thereon by showing that he had no knowledge of the making of the contract, unless he also shows that it was outside the scope of the partnership business.

¹Reported in 174 N. W. 436.

Account stated.

2. Where a debtor receives a statement of account, and not only retains it for some months without questioning its correctness, but also promises to pay it, he gives it the standing of an account stated which is assailable only for fraud or mistake.

Same — directed verdict.

3. An account stated having been established, and defendants having failed to present any competent evidence to prove their alleged offset, the court properly directed a verdict for plaintiff.

Action in the district court for Mahnomen county to recover \$698 upon an account stated. The facts are stated in the opinion. The case was tried before Grindeland, J., who granted plaintiff's motion for a directed verdict. From an order denying their motion for a new trial, defendants appealed. Affirmed.

P. F. Schroeder, for appellants.

Johnston & Carman, for respondent.

TAYLOR, C.

Action on an account stated. The court directed a verdict for plaintiff and defendants appealed from an order denying a new trial.

Defendants, as copartners under the firm name of Johnson Brothers, have a printing office and publish a newspaper called the Mahnomen Free Press at Mahnomen in Mahnomen county. Plaintiff is engaged in business at Des Moines, Iowa, and among other things makes and publishes county and other maps. Early in 1917, defendants wrote plaintiff concerning the making of a map of Mahnomen county. After some preliminary correspondence concerning the character of the map and the matter to be shown thereon, plaintiff made a proposition to make one thousand maps for defendants at specified prices, the data for the maps to be furnished by defendants, and the purchase price to be paid in three equal instalments 30, 60 and 90 days from date of shipment of the maps. By letter dated April 4, 1917, defendants accepted plaintiff's proposition. After a few minor changes mutually agreed upon, the maps were made and shipped. Thereafter and on October 15, 1917, plaintiff mailed defendants a statement of account, showing the sev-

eral items and that the entire purchase price for the one thousand maps was the sum of \$747. On November 11, 1917, defendants remitted the sum of \$49 and promised to make a further remittance in a week or ten days. Thereafter plaintiff sent two or three statements of account at intervals of about a month, and also wrote several letters insisting upon payment. On January 21, 1918, defendants wrote to the effect that they did not have the money to pay for the maps, but were making a strenuous effort to obtain it. In the spring of 1918, plaintiff placed the account in the hands of its attorneys for collection, who made three or four personal demands for payment and to whom defendants paid \$50 on June 28, 1918. No other payments were made and thereafter plaintiff brought this suit upon an account stated.

Defendant Joseph contends that no cause of action has been established against him, for the reason that he had no knowledge of the transactions with plaintiff and took no part therein.

At the trial Joseph testified to the existence of the partnership, that the partnership business was managed and conducted wholly by Louis, and that he, Joseph, resided on his farm and had never given any personal attention to the partnership business nor taken any active part therein, but was what might be termed a silent partner. Although testifying that he had not personally directed or authorized the making of the contract, he made no attempt to show that the contract was outside the scope of the partnership business, nor that Louis lacked authority to make it on behalf of the partnership. The transactions between defendants and plaintiff were conducted wholly by correspondence. Plaintiff's proposition was made in letters to the firm, and the letter accepting it was signed in the firm name by Louis. It is true that Louis wrote several other letters to plaintiff, to which he signed only his individual name, but no letter found in the record contains any intimation that the contracting party was other than the partnership. It is also true that Louis claims that, at some indefinite date, he wrote a letter (not produced), in which he stated that Charles and Joseph Leith were interested with him in the map project. They prepared part of the data for the map, and this statement, if made, was made in connec-

tion with the furnishing of such data. The map bore the statement that it was published by the Mahnomen Free Press.

We think the court was correct in ruling that the contract was made with the partnership and was binding upon both partners.

As a defense defendants denied that any account had ever been stated or agreed to, and interposed a claim for damages for alleged inaccuracies in the map.

It is undisputed that they received the statements of account above mentioned, and not only retained them without objecting to the account, but promised to pay it. By this conduct they acquiesced in the correctness of the account and gave it the standing of an account stated. *L. L. Elwood Mfg. Co. v. Betcher*, 72 Minn. 103, 75 N. W. 113; *Western Newspaper Union v. Segerstrom Piano Mfg. Co.* 118 Minn. 230, 136 N. W. 752; *Walker v. Steel*, 9 Colo. 388, 12 Pac. 423; *McCormack v. Sawyer*, 104 Mo. 36, 15 S. W. 998; *Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063; *Oberdorfer v. Moyer*, 30 Utah, 325, 84 Pac. 1102; *Stickler v. Giles*, 9 Wash. 147, 37 Pac. 293.

An account stated "can be assailed or set aside only on the ground of fraud or mistake." *Behrens v. Kruse*, 132 Minn. 69, 155 N. W. 1065, 156 N. W. 1, and cases there cited. No attempt was made to prove either fraud or mistake.

Even at the trial defendants did not challenge the correctness of the account further than to assert that damages for the alleged inaccuracies in the map should be offset against it. No claim of imperfection or inaccuracy was made, until defendants were informed that suit was about to be brought to enforce payment of the account. At the trial defendants offered no competent evidence tending to prove the existence of the alleged inaccuracies. All the data for the map was furnished by defendants themselves in writing. The court informed them that they would be permitted to show discrepancies between the map and the data so furnished. They did not produce this data, claiming that it was in the possession of plaintiff. They had served no notice on plaintiff to produce it, and it was not in court nor in the possession of plaintiff's attorneys. So far as appears defendants had made no effort whatever to procure it. They attempted to prove the discrepancies by the testi-

mony of defendant Louis, to the effect that the data had been taken from the official records of Mahnomen county, and that the map differed from those records in certain unspecified particulars. This testimony was excluded on the ground that no foundation had been laid for it. The ruling was correct. The question was whether the map differed from the data contained in the writings furnished by defendants.

Parol evidence of the contents of written documents in the possession of the adverse party is not admissible, unless notice to produce the original has been given to him in time to afford him a reasonable opportunity to produce it and he fails to do so. *Dade v. Aetna Ins. Co.* 54 Minn. 336, 56 N. W. 48; 5 *Chamberlayne*, Evidence, § 3585, and cases there cited. Defendants having offered no competent evidence in support of their claim and the account stated having been established, the court properly directed a verdict for plaintiff.

Order affirmed.

RICHARD A. BEITZ AND OTHERS v. EMMA BUENDIGER AND
ANOTHER.¹

October 24, 1919.

No. 21,367.

Adverse possession must be openly hostile.

1. Adverse possession must be openly hostile. Divesture of title by adverse possession rests upon proof or presumption of notice to the true owner of the hostile character of the possession.

Same — possession of tenant in common presumptively not hostile.

2. The possession of one tenant in common is presumed not to be hostile. Possession originating in a tenancy is presumably not hostile. Acts of occupation sufficient to show hostility as to strangers may not be sufficient as between near relatives. In all cases where the original occupation was permissive, the statute will not run until an adverse holding is declared and notice of such change is brought to the knowledge of the owner.

Same — assertion of hostile title.

3. Proof of inception of hostility must in all such cases be clear and

¹Reported in 174 N. W. 440.

unequivocal. But it is not necessary that the assertion of title be expressly or affirmatively declared. This may be shown by circumstances.

Same — evidence.

4. Property in controversy consisted of a house and lot inherited by three sisters. It was exclusively occupied by one as a home for nearly 25 years. After her death her children occupied or rented it out for five years. These occupants paid the taxes for this whole period and made substantial improvements from time to time. The other sisters lived near by. They never asserted any right in the property, though not always on friendly terms. *Held*, the evidence sustains a finding of title by adverse possession.

Action in the district court for Otter Tail county to determine adverse claims to certain real estate. The case was tried before Parsons, J., who made findings and ordered judgment in favor of plaintiffs. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

George W. Frankberg, for appellants.

M. J. Daly, for respondents.

HALLAM, J.

Plaintiffs claim title by adverse possession to a house and lot in Perham. Ida Beitz and defendants were sisters. Their mother, Agnes Hermann, owned the property in question. She died in 1888. Probate proceedings were soon thereafter begun, and in 1895 this property was assigned to the three sisters. Ida Beitz was married in 1889. From the time of her marriage until her death in 1913 she occupied this house as her home. Her husband died in 1907. Plaintiffs are her children. They were all born in this house and knew no other home. Since their mother's death they have occupied this house part of the time. Part of the time they have rented it out. For two or three months soon after this marriage Ida Beitz or her husband paid rent for the house. For nearly 30 years no rent was paid. During all this period the Beitz family had exclusive occupation. They paid all taxes and on two occasions the husband undertook to perfect a tax title in himself. They almost doubled the size of the house, brick-veneered it, and on one occasion reshingled it. Their possession was exclusive, continuous, open and notorious. The only question is, was it hostile? The district court answered this question in

the affirmative and gave judgment for plaintiffs. Defendants appealed.

1. Adverse possession must be openly hostile. Divestiture of title by adverse possession rests upon the proof or presumption of notice to the true owner of the hostile character of the possession. *Bausman v. Kelley*, 38 Minn. 197, 209, 36 N. W. 333, 8 Am. St. 661. It is for this reason that possession, in order to be adverse, must be actual and visible. *Murphy v. Doyle*, 37 Minn. 113, 33 N. W. 220. The character of the occupation may be sufficient to give notice of its adverse character to interested parties who are strangers, and yet not sufficient as to persons standing in more intimate relation.

2. If these parties had been strangers, no one would question that the evidence would be amply sufficient to sustain a finding that the possession was hostile. But they were owners in common. The possession of one owner in common is presumed not to be adverse or hostile. *Berthold v. Fox*, 13 Minn. 462 (501), 97 Am. Dec. 243. Apparently, too, the possession of the Beitz family was originally under some sort of tenancy. Possession originating in a tenancy is presumably permissive, not hostile. The interested parties were relatives also. Permissive occupation of the family estate by one of the family is so usual that acts of occupation thereof, sufficient to show hostile possession as to strangers, are not always sufficient as between near relatives. But possession may be hostile even under such a combination of circumstances. Whether it is or not is a question of proof. In all cases where the original entry or occupation was permissive, the statute will not begin to run until an adverse holding is declared, and notice of such change is brought to the knowledge of the owner, and, for this purpose, mere possession is not ordinarily enough, *Cameron v. Chicago, M. & St. P. Ry. Co.* 60 Minn. 100, 103, 61 N. W. 814, though after long lapse of time the court may, even in such cases, presume ouster from exclusive enjoyment. *Lowry v. Tilleny*, 31 Minn. 500, 503, 18 N. W. 452.

3. Proof of inception of hostility of possession must in all such cases be clear and unequivocal. *Tyler, Ejectment*, p. 860; *Omodt v. Chicago, M. & St. P. Ry. Co.* 106 Minn. 205, 118 N. W. 798. Reference is made to language found in *Collins v. Colleran*, 86 Minn. 199, 90 N. W. 364, reiterated in the *Omodt* case, that to convert permissive possession into hostile possession the occupant "must make an 'explicit disclaimer' of

subserviency * * * that this disclaimer must be 'clear, unequivocal, and notorious'; and that his possession becomes adverse only upon a 'notorious assertion of right in himself.' " But this does not mean that the assertion of adverse title must in such cases be expressly or affirmatively declared. It may be shown by circumstances. *Cool v. Kelly*, 78 Minn. 102, 80 N. W. 861; *Kelly v. Palmer*, 91 Minn. 133, 97 N. W. 578; *Sawbridge v. City of Fergus Falls*, 101 Minn. 378, 112 N. W. 385; *Gaston v. May*, 120 Minn. 154, 138 N. W. 1025.

4. While these parties were sisters, there is evidence that they were not always on friendly terms. This is significant. *Tyler v. Wright*, 164 Mich. 606, 130 N. W. 205. Defendants both lived near these premises, one of them across the street, but neither of them ever asserted any right in the property. One of them, Mrs. Grunert, did not appear at the trial and her testimony was not taken. She answered only by adopting the answer of her codefendant. The other defendant, Mrs. Buendiger, appeared at the trial. Her explanation of her silence was that she was willing that her sister, Mrs. Beitz, should occupy the premises as a home during her life. No explanation was offered for permitting her sister's children to remain in uninterrupted possession for the five years after their mother's death, during part of which time they rented the house to tenants. Considering these facts in connection with the long continued exclusive possession, the payment of taxes and the substantial improvements made, we think the evidence sufficient to sustain the court's finding that the possession was hostile. See *Hanson v. Gallagher*, 154 Iowa, 192, 134 N. W. 421; *Henning v. Warner*, 109 N. C. 406, 410, 14 S. E. 317.

O'Boyle v. McHugh, 66 Minn. 390, 69 N. W. 37, and *Collins v. Colleran*, 86 Minn. 199, 90 N. W. 364, relied upon by defendants seem to us to be distinguishable from this case. Both were cases where adverse possession was claimed by father against son. The presumption of permissive occupation is much stronger as between parent and child than between estranged sisters. Cases arising between parent and child are in a class by themselves. See 2 C. J. 157, and cases cited.

Defendant's counsel quotes also this language from *Collins v. Colleran*: "The doctrine is not affected by the fact that the occupant has paid all taxes, and valuable improvements, and apparently is exercising complete

dominion over the premises, for all this follows and is to be expected from the relationship." We think this refers to the "relationship" disclosed to exist between the parties to that action. Surely it was not the intent of the court to hold that the acts mentioned were not indicative of adverse character of possession, nor could it have been intended that we should deduce the inference that such acts, continued for more than 25 years, were "to be expected" from any "relationship" existing in this case. In *Kelly v. Palmer*, 91 Minn. 133, 97 N. W. 578, a later case, it was said that the removal of a barn, the building of a kitchen, shingling the house, building fences were acts "not the acts of a mere licensee, but of a disseisor in fact, asserting by such acts dominion over and title to the lot."

We think the evidence sustains the finding of the trial court.

Judgment affirmed.

**MARGARET R. HANSMAN v. WESTERN UNION TELEGRAPH
COMPANY AND OTHERS.**

**NORTHWESTERN TELEPHONE EXCHANGE COMPANY,
APPELLANT.¹**

October 24, 1919.

No. 21,369.

Covenant of landlord to heat — liability to tenant's servant.

1. A lessor, who leases property with a covenant to keep it properly heated, is liable to an employee of his tenant for a negligent failure to heat properly. Following *Glidden v. Goodfellow*, 124 Minn. 101.

Same — negligence of landlord — evidence.

2. The evidence sustains a finding that the defendant telephone company negligently failed to heat properly premises leased to the telegraph company in the employ of which the plaintiff was.

Contributory negligence of plaintiff not shown.

3. The evidence does not require a finding that the plaintiff was at fault in caring for herself, or in remaining at work under the conditions to which she was subjected while working for the telegraph company, so as to prevent a recovery from the telephone company for its negligent failure to heat.

¹Reported in 174 N. W. 434.

Negligence — proximate cause.

4. The evidence sustains a finding that the tuberculosis from which the plaintiff is suffering was the proximate result of the negligent failure of the telephone company properly to heat the premises in which she worked for the telegraph company.

Verdict not excessive.

5. The verdict is not excessive.

After the former appeal reported in 136 Minn. 212, 161 N. W. 512, the case was tried before Stanton, J., and a jury which returned a verdict in favor of plaintiff for \$18,500. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

E. A. Prendergast, for appellant.

Samuel A. Anderson, for respondent.

DIBELL, J.

Action to recover damages alleged to have been sustained through the negligence of the defendant telegraph company and telephone company. A verdict was directed in favor of the telegraph company. The jury found a verdict against the telephone company and it appeals from the order denying its alternative motion for judgment or a new trial. This case was here before and is reported in 136 Minn. 212, 161 N. W. 512.

1. The plaintiff commenced work in an office at Luverne, Minnesota, on January 24, 1914, in the joint employ of the telephone company and the telegraph company. In April, 1914, her work for the telephone company ceased and from then on she worked for the telegraph company. The premises were leased by the telephone company from one Treat. In the lease the "lessor agrees to keep said premises heated with hot water heat during the entire term of this lease whenever artificial heat is necessary to keep said premises at a temperature of seventy (70) degrees above zero Fahrenheit, without extra cost to said lessee." The telephone company leased the premises to the telegraph company from about May 1, 1914, and until February, 1915, and agreed to furnish heat substantially in accordance with the terms of its lease with Treat. This brings the case in accord with *Glidden v. Goodfellow*, 124 Minn. 101, 144 N.

W. 428, L.R.A. 1916E, 1073, and *Glidden v. Second Ave. Inv. Co.* 125 Minn. 471, 147 N. W. 658, L.R.A. 1915C, 190, and for the negligence of the telephone company in failing to furnish heat it was liable to the plaintiff although she was working for the telegraph company.

2. There is sufficient evidence of the negligent failure to provide heat. It tends to show that in the winter months of 1914 and 1915 and until the company moved in February, 1915, the office was nearly constantly cold and unfit for occupancy for the plaintiff's work. The plaintiff says that in November and December, 1914, and January, 1915, the temperature ranged from 50 to 55 degrees and rarely reached 60 degrees. In this she may be inaccurate and her statement may be an exaggeration. The evidence is ample that the room was continually cold, that complaint was made of it to the telephone company officers with whom the plaintiff came in contact, and that while some apparent effort was made to remedy conditions there was no substantial improvement. There is evidence that some of the men avoided the office and worked elsewhere. The case is not one, if the evidence is believed, of an occasional and perhaps unavoidable exposure to cold but of a continuous exposure for several months.

3. The plaintiff is now afflicted with tuberculosis and claims that the cause of it is to be found in the conditions to which she was subjected. The defendant urges that she was herself at fault and is barred of recovery either upon the general theory of contributory negligence or of a voluntary assumption of the risks of the conditions obtaining. The jury found to the contrary and we cannot say that its finding is not sustained. There is nothing in the living conditions of the plaintiff, nor in her care for her health, which requires a finding that she was at fault. She knew that it was very cold and uncomfortable in the office. It cannot be said as a matter of law that she knew or anticipated or should have known or anticipated such injurious results as came, or that she should have known or anticipated results at all serious. It cannot be said as a matter of law that she should have abandoned her work because of the failure to heat.

4. A seriously contested question is whether the tuberculosis from which the plaintiff is suffering came from her exposure to the conditions in the office. She says that in January, 1915, she noticed some trouble in her throat and bronchial tubes, and developed a hacking or cough, and noticed somewhat of a weakening of her general health. She gradually

grew weaker and in July ascertained that she was suffering from tuberculosis. The evidence of her family history and her condition before and while at Luverne are given in detail. Two physicians who examined the plaintiff and heard the testimony were of the opinion that her present trouble is traceable to her exposure. There is medical testimony that it is not so traceable. The defendant claims that the plaintiff had a bad family history and that she was predisposed to tuberculosis. In determining whether her present condition is ascribable to her exposure at Luverne this claim hardly helps the defendant. *Young v. St. Paul City Ry. Co.* 142 Minn. 10, 170 N. W. 845. Upon a consideration of the evidence we are of the opinion that the question was for the jury. The following cases are cited as useful but in no sense are they controlling: *Keegan v. Minneapolis & St. L. R. Co.* 76 Minn. 90, 78 N. W. 965; *Decker v. Chicago, M. & St. P. Ry. Co.* 102 Minn. 99, 112 N. W. 901; *Mageau v. Great Northern Ry. Co.* 106 Minn. 375, 119 N. W. 200; *Healy v. Hoy*, 115 Minn. 321, 132 N. W. 208; *State v. James*, 123 Minn. 487, 144 N. W. 216; *Glidden v. Goodfellow*, 124 Minn. 101, 144 N. W. 428, L.R.A. 1916F, 1073; *Wendt v. Bowman & Libby*, 126 Minn. 509, 148 N. W. 568; *Young v. St. Paul City Ry. Co.* 142 Minn. 10, 170 N. W. 845.

5. The verdict was for \$18,500. It is claimed that it is excessive. Conservatively invested it will bring a tidy income without an impairment of the capital. The plaintiff is 27 years of age. She was getting \$40 per month when working for the telegraph company. The evidence favorable to the plaintiff indicates that she will always have a fight for life and is properly a sanatorium subject. All this means an expenditure of money. She must be well cared for if she makes a winning fight. She cannot go among people as she could were she not afflicted with tuberculosis. She cannot expect to be the mistress of her own home. To a considerable extent she is socially ostracised. There was evidence from which the jury could find the conditions recited. We cannot say that the verdict is excessive as the result of passion or prejudice. The trial court did not think it so.

Order affirmed.

HOLT, J. (dissenting).

I dissent. It may be confidently asserted that in our relations with

our fellowmen we act on the assumption that every normal person of mature age is better able than anyone else to determine what degree of heat or cold is safe for him. And by voluntarily remaining in a room which such person knows to be inadequately heated he should be held to have assumed the resulting risk.

BROWN, C. J. (dissenting).

I concur in the dissent of Justice Holt.

AMIEL NIENOW v. THE VILLAGE OF MAPLETON AND
OTHERS.¹

October 24, 1919.

No. 21,388.

Nuisance — statutory notice of claim unnecessary.

1. Section 1786, G. S. 1913, does not apply to an action brought to recover damages and enjoin the continuance of a nuisance caused by a village permitting sewage to be deposited on plaintiff's land.

Special verdict on questions of fact.

2. Special findings made by a jury upon questions of fact submitted to them are not simply advisory, but are as binding on the court as a general verdict.

Injunction to stop a nuisance.

3. Plaintiff was entitled to an injunction upon findings by the jury that at the time of the commencement of the action, and since its commencement and at the time of the trial, the defendants maintained a nuisance upon or in the immediate vicinity of plaintiff's farm, the court having denied defendants' application to vacate such findings.

Action in the district court for Blue Earth county to recover \$1,365 damages and to restrain defendant village and its officers from continuing a nuisance. The answer among other matters alleged that for more than 25 years a drainage ditch had been established along a natural drainage course across the premises of plaintiff and kept open by his

¹Reported in 174 N. W. 517.

grantors prior to its purchase by him; that this was the natural drainage of the land within the limits of defendant village; that by the use of said drainage ditch and by the construction in the year 1902 by the county authorities of County Ditch No. 7 along this natural watercourse, with the knowledge of all parties and with the knowledge and consent of the grantors of plaintiff, defendants acquired an easement and right to use the same for general drainage purposes, and plaintiff purchased his premises with full knowledge and notice of the rights of defendants in the premises; that at the time of the construction of said county ditch plaintiff's grantors were awarded and paid damages in full for all future damages that could be caused by the maintenance of the county ditch; that if defendants were enjoined from using the natural outlet to this drainage system, they would suffer great and irreparable injury, and that there would be great danger that the entire community would become contaminated and infected with disease, which would spread in and about the village and the locality tributary to the village of Mapleton.

A supplemental answer alleged that defendant village had without delay constructed septic tanks and a purification plant which removed all refuse matter and foreign substances from the water before it flowed into said county ditch.

The case was tried before Comstock, J., who when plaintiff rested denied defendants' motion to dismiss the action and at the close of the testimony their motion for a directed verdict, and a jury which returned a general verdict in favor of plaintiff for \$600 and answered special questions as stated in the first paragraph of the opinion. Thereafter plaintiff applied for a permanent injunction against defendants and the court made findings adopting the special findings of the jury, and upon the verdict and record ordered judgment for the plaintiff for \$600, and denied the motion for an injunction. Plaintiff's motion for amended and additional findings and defendants' motion for amended findings were denied. From the judgment denying his motion for a permanent injunction, plaintiff appealed. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed on defendants' appeal. Reversed on plaintiff's appeal.

H. L. & J. L. Schmitt and H. M. Berry, for plaintiff.

C. J. Laurisch, U. G. Argetsinger and S. B. Wilson, for defendants.

LEES, C.

This is an action brought to recover damages and to obtain an injunction restraining an alleged nuisance caused by the discharge of sewage on plaintiff's land. A jury returned a general verdict in plaintiff's favor for damages, with special findings, the third of which is as follows: "Q. Has the defendant, since the commencement of this action, maintained and is it now maintaining a public nuisance upon or in the immediate vicinity of plaintiff's farm? A. Yes." The fourth question was the same as the third, omitting the word "public," and was answered in the same way. Plaintiff moved for judgment on the general verdict for damages and for an injunction restraining defendants from continuing the discharge of sewage where it would come on his land. The court made findings in which the special findings of the jury were incorporated. Among the facts found by the court were the following:

That the village of Mapleton maintains a sanitary sewer, discharging into a county ditch which extends across plaintiff's land; that prior to the construction of the ditch the surface waters from the greater portion of the territory included in the village, ran off naturally, substantially along the course of the ditch; that the village was assessed for benefits in the proceedings for the construction of the ditch and has since used it to carry off surface waters; that plaintiff permitted his live stock to get into the ditch, and in consequence it has partially filled up and the flow of water has been interfered with; that there are over a thousand inhabitants in the village, and for the protection of their health a drainage system substantially similar to the one in use is a public necessity, and that irreparable injury would be worked by an injunction restraining its use; that since the action was commenced the village has constructed a septic tank in connection with its sewer system for the purification of sewage, and that, if the tank is properly maintained and operated, it will render the sewage inoffensive, and, if it fails fully to accomplish this result, a slight modification of the system will accomplish it, and that plaintiff has an adequate remedy at law for any damage he may sustain and hence is not entitled to an injunction.

Both parties moved for amended findings. Defendants' motion was

that the general verdict be set aside and that the answers to the special findings be changed from "yes" to "no." Both motions were denied. Judgment was then entered upon the verdict and the findings made by the court. Plaintiff appeals from that portion of the judgment which denied him an injunction, and defendants from the judgment against them for damages. Both appeals were heard together.

DEFENDANTS' APPEAL.

1. Upon defendants' appeal, the only question which requires consideration is whether G. S. 1913, § 1786, applies, it being conceded that the notice provided for by that section was not given. We are of the opinion that the statute does not apply to this case. In *Joyce v. Village of Janesville*, 132 Minn. 121, 155 N. W. 1067, L.R.A. 1916D, 426, it was held that such notice was not essential to the maintenance of an action against a municipal corporation for equitable relief. Whether it was necessary to the maintenance of an action for damages caused by a nuisance created by a municipal corporation was not expressly decided, but it was clearly intimated that the statute only applied to cases where the basis for relief is negligence, and that it did not apply to the case of an invasion of plaintiff's premises with an offensive foreign substance brought there by means of artificial appliances.

In effect the statute requires notice to be given where damages are claimed on account of a defect in a public way or place, which is within the exclusive control of a city or village, or by reason of the negligence of any of its officers, agents or servants. The findings of the jury are that defendants created and maintained a nuisance and that plaintiff's damages were caused by the affirmative, wrongful acts of the defendants, and not through negligence. We hold that the statute does not apply to such a case. The following cases bear more or less directly upon the point decided and tend to sustain our conclusion: *Mitchell v. Village of Chisholm*, 116 Minn. 323, 133 N. W. 804; *Diamond Iron Works v. City of Minneapolis*, 129 Minn. 267, 152 N. W. 647; *Johnson v. City of Duluth*, 133 Minn. 405, 158 N. W. 616.

PLAINTIFF'S APPEAL.

2. Upon plaintiff's appeal, two questions are discussed: (1) Wheth-

er the village was a wrongdoer in permitting sewage to enter the county ditch? (2) Whether plaintiff was entitled to a permanent injunction upon the facts as found? The findings of the jury were not simply advisory, and the court could not reject them in its discretion and dispose of the case without reference to them. They were as binding on the court as a general verdict in an action triable by jury. *Reider v. Walz*, 93 Minn. 399, 101 N. W. 601; *Buzalsky v. Buzalsky*, 108 Minn. 422, 122 N. W. 322; *Lewis v. Murray*, 131 Minn. 439, 155 N. W. 392. The findings made by the court are inconsistent with those of the jury, and more particularly the third and fourth. Apparently the court did not intend to vacate any of the special findings, for defendants' application to set them aside was denied, as was their motion to amend the court's findings by adding thereto that since the commencement of the action the defendants have not and are not now maintaining a nuisance upon or in the immediate vicinity of plaintiff's farm. Insofar as the findings made by the court are inconsistent with those made by the jury, they cannot be sustained. If the latter are allowed to stand, plaintiff is entitled to an injunction restraining defendants from continuing the nuisance complained of. *Nelson v. Swedish E. L. C. Assn.* 111 Minn. 149, 126 N. W. 723, 127 N. W. 626, L.R.A. (N.S.) 565, 20 Ann. Cas. 790; *Lead v. Inch*, 116 Minn. 467, 473, 134 N. W. 218, 39 L.R.A. (N.S.) 234, Ann. Cas. 1913B, 891; *Batcher v. City of Staples*, 120 Minn. 86, 139 N. W. 140; *Heath v. Minneapolis, St. P. & S. Ste. M. Ry. Co.* 126 Minn. 470, 474, 148 N. W. 311; *Joyce v. Village of Janesville*, *supra*; *Brede v. Minn. Crushed Stone Co.* 143 Minn. 374, 173 N. W. 805.

The question of the right of the village to discharge sewage at a place from which it flows into the county ditch has been presented and argued, but it is unnecessary to pass upon it in view of the fact that there must be a new trial of the equitable issues in the case. We find nothing in the assignments of error of either party, which we have not discussed, requiring special consideration.

Upon defendants' appeal from the judgment for damages, such judgment is affirmed.

Upon plaintiff's appeal from the portion of the judgment which denies him equitable relief, the judgment is reversed and a new trial granted.

JENNIE COURTNEY v. R. C. NAGLE.¹**October 24, 1919.****No. 21,389.****Work and labor — money received — verdict not excessive.**

1. The claim that the damages awarded are so excessive as to indicate that they were given under the influence of passion or prejudice finds no support in the record.

Verdict sustained by evidence.

2. The evidence fairly sustains the verdict rendered.

Action in the district court for Ramsey county to recover \$2,350. The facts are stated in the opinion. The case was tried before Dickson, J., and a jury which returned a verdict for \$1,000. From an order denying his motion for a new trial, defendant appealed. Affirmed.

T. R. Kane, for appellant.

John J. Kirby, for respondent.

HOLT, J.

Plaintiff recovered a verdict against defendant, her brother, in the sum of \$1,000 for services and for money had and received by him for her use. He appeals from an order denying a new trial.

The verdict is said to be so excessive that it must be held to have been given under the influence of passion or prejudice. Plaintiff claimed that she was residing in California and received letters from defendant urging her to come to St. Paul to act as nurse and housekeeper for him, he having suffered a nervous breakdown, and agreeing to pay her expenses for the trip and reasonable compensation for her work; that she did come at the expense of about \$220, and that she acted as nurse and housekeeper for him for 11 months which she says was worth \$150 a month. The contention with respect to the money received for her use is that, in a transaction with her father, defendant had received \$500 under an agreement to pay the same to her, and also \$350 from her brother Ter-

¹Reported in 174 N. W. 436.

rence under a similar promise. Defendant, while admitting that he had written, requesting plaintiff to come to him, says that later, and before she started, he wrote her not to come, and that when she, this notwithstanding, did arrive, the agreement was made that she and her adopted son might remain with him, but that no compensation should be made for her services beyond furnishing shelter and food for herself and child. He wholly denied having received any money for her use, and asserted that during the three years prior to her coming to him she had received \$425 from him.

The issues were clearly defined. The oral testimony given by the litigants cannot be reconciled. One or the other necessarily falsified, and the record indicates that neither held closely to the truth. A sister corroborated defendant to some extent, and a like service was done for plaintiff by a cousin of the parties. The case was peculiarly one for the jury, and this court should not disturb the verdict, approved as it is by the trial court, unless the amount may be said to be so excessive as to clearly indicate that it was given under the influence of passion or prejudice. From defendant's letters the jury could scarcely avoid the conclusion that at the commencement of the action there was due and unpaid from defendant to plaintiff, for money had and received to her use, the sum of \$450. The jury could further find, if they believed her story, that he had agreed to pay her expenses to St. Paul and wages; that the expenses amounted to \$220; and that the value of her 11 months' services was at least \$330. The question whether the jury were actuated by passion or prejudice does not arise, for it cannot be said that the verdict is excessive.

The assignment of error based on the claim that the verdict is not sustained by the evidence needs no discussion, for as above indicated there is testimony which, if believed by the jury, fully warrants one in favor of plaintiff in the amount awarded.

Affirmed.

ROSE DELASCA v. GORDON GRIMES AND ANOTHER.¹

October 24, 1919.

No. 21,395.

Venue — when defendant can waive right to trial in county of his residence.

1. When the venue does not go to the jurisdiction of the court over the subject matter of the action, a party may waive his right to a trial in a particular county, and such waiver may be implied. By going to trial without objection in a county in a judicial district to which the case was remanded by the district court of another judicial district, and by failing to ask or obtain a ruling by the trial court on the question of whether the action was properly triable in such county, a defendant waives his right to assert that he was entitled to a trial in the county where he resides, and that the order remanding the case to the county where it was tried was erroneous.

Local action.

2. If the subject matter of an action is land and the principal relief sought relates to the land, the action must be brought and tried in the county where the land is situated.

Appeal and error — when objection to complaint is waived.

3. On appeal from an order denying a new trial, a defendant will be held to have waived his right to assign as error an order overruling his demurrer to the complaint, where neither by answer nor at the trial by objection or motion did he challenge the sufficiency of the complaint on any of the grounds specified in his demurrer.

Setting aside a deed from client to attorney's wife — evidence.

4. An attorney obtaining a deed from his client has the burden of establishing the perfect fairness and good faith of the transaction and the adequacy of the consideration. The evidence sustains a finding and conclusion that a deed so obtained, running to the attorney's wife, should be set aside.

Same — accounting.

5. Upon setting aside a deed so obtained there should be an accounting between the parties, in which the plaintiff should be credited with the rents and profits of the land and charged with taxes, interest and other proper expenditures made by defendants.

¹Reported in 174 N. W. 523.

Action in the district court for Chisago county for an accounting and to set aside plaintiff's deed to one of the defendants. The case was tried before Searles, J., who made findings and ordered judgment as set out in the fourth paragraph on page 71. From an order denying their motion to set aside the findings and for a new trial, defendants appealed. Reversed.

George S. Grimes, for appellants.

T. R. Kane, for respondent.

LEES, C.

Appeal from an order denying a new trial in an action brought to set aside a deed and for an accounting.

The complaint sets up three separate causes of action. In the first it is alleged that, under an agreement that his fee should be \$50, plaintiff employed defendant Gordon Grimes as her attorney to bring an action against her husband for divorce, that he brought the action and obtained for her the title to a farm in Chisago county, of which she is the present owner, and that he exacted money from her in excess of his agreed fee by threatening to abandon the case if she did not pay him. In the second, it is alleged that, while acting as her attorney, he took from her a mortgage on the farm for \$500 and paid her but \$200. In the third, it is alleged that, while still acting as her attorney and because of her confidence in him, he procured from her a deed of the farm running to his wife, who is the nominal owner only; that he agreed to pay her \$1,200 for the deed, but has only paid a small portion of that sum, and that the farm was worth \$7,000 and was subject to mortgages amounting to \$4,000. The prayer for relief is that she have an accounting with him, that the deed be set aside, and that she have such other relief as may be equitable.

1. The action was brought in Chisago county. Defendants were residents of Hennepin county, and duly served and filed affidavits and a demand for change of venue from Chisago to Hennepin county, pursuant to G. S. 1913, § 7722. The files were transmitted to Hennepin county and thereafter plaintiff moved, in the district court of that county, that the case be remanded to Chisago county, on the ground that the district court of Hennepin county had no jurisdiction of the subject matter of

the action. An order was made granting the motion, and the files were returned to Chisago county with a certified copy of the order. It does not appear that the proceedings above set forth were directly called to the attention of the trial court by either party. Defendants demurred to the complaint, and the demurrers were overruled with leave to answer. They answered and the case went to trial and was tried in Chisago county without objection. In the motion for a new trial no mention was made of the alleged error of the district court of Hennepin county in remanding the case. The trial court was never asked to act with reference thereto. Defendants assign as error the order of the district court of Hennepin county.

In *Wilson v. Richards*, 28 Minn. 337, 9 N. W. 872, the propriety of an order changing the venue of an action was reviewed on appeal from an order denying a new trial, and in *Taylor v. Grand Lodge, A. O. U. W.* 98 Minn. 36, 107 N. W. 545, on appeal from a judgment. In both cases, however, the trial court was called upon to rule and did rule upon the question of whether the case was properly triable in a county other than that of defendant's residence, and it was the ruling of the trial court which was attacked on appeal. The question was also considered in *Flowers v. Bartlett*, 66 Minn. 213, 68 N. W. 976, and in *Cassery v. Morrow*, 101 Minn. 16, 111 N. W. 654. In the latter case, the action was remanded to the county in which it had been brought, and defendants appeared specially and objected to the jurisdiction of the court, for the reason that the action was still properly pending before the district court of the county to which the files had been transmitted.

The practice of obtaining a review of an order relating to the venue of an action by appealing from an order denying a new trial, or from a judgment, is not to be commended. A speedy determination of the action upon the merits will not be reached if the question is reserved until after the case has been tried, for, if a reversal be had on that ground, the parties have been put to the expense of a trial on the merits, which has accomplished nothing. This court has repeatedly held that, when the venue does not go to the jurisdiction of the court over the subject matter, a party may waive his right to a trial in a particular county and that the waiver may be implied. *Sherman v. Clark*, 24 Minn. 37; *Chesterson v. Munson*, 27 Minn. 498, 8 N. W. 593; *Nystrom v. Quinby*, 68 Minn.

4, 70 N. W. 777. We hold that by going to trial in Chisago county without objection, and by failing to ask or obtain a ruling by the trial court on the question of whether the action was properly triable in that county, defendants have waived their right to assert that they were entitled to a trial in Hennepin county. It is elementary that this court can only pass upon such questions as have been actually or presumably considered and determined in the court below, and upon this ground we might well hold that there is nothing here for review. Even upon the merits, it is doubtful whether defendants' position is well taken, for, if land is the subject matter of an action and the principal relief sought relates to the land, it must be brought and tried in the county where the land is situated. *State v. District Court of Clay County*, 120 Minn. 99, 139 N. W. 135; *Kommer v. Harrington*, 83 Minn. 114, 85 N. W. 939, and G. S. 1913, § 7715, control since in the cases there enumerated the court has no jurisdiction of the action, if the county designated in the complaint is not the proper county. *Kretzschmar v. Meehan*, 74 Minn. 212, 77 N. W. 41.

2. The defendants separately demurred to the complaint, the defendant Gordon Grimes on the ground that several causes of action were improperly united; his codefendant on the same ground and on the additional ground that the complaint failed to state a cause of action against her. The order overruling the demurrers is assigned as error. Within the principle stated in *State v. Knife Falls Boom Corp.* 96 Minn. 194, 104 N. W. 817, it may well be doubted whether the complaint was open to the objection that several causes of action were improperly united, but it is unnecessary to so decide. Prior to the enactment of chapter 474, p. 699, Laws 1913, it was held that, by answering after his demurrer to the complaint is overruled, a defendant waives all right to except to the decision of the court on the demurrer. *Cook v. Kittson*, 69 Minn. 474, 71 N. W. 670; *Disbrow v. Creamery P. M. Co.* 110 Minn. 237, 244, 125 N. W. 115. The 1913 act took away the right of appeal from an order overruling a demurrer, unless the trial judge (court) certified that in his opinion the question presented was important and doubtful. But by his answer, defendant may take advantage of the improper joinder of several causes of action. *James v. Wilder*, 25 Minn. 305; *Campbell v. Railway Transfer Co.* 95 Minn. 375, 104 N. W. 547. Hence,

by answering without taking advantage of the point, he should be held to waive it. *Disbrow v. Creamery P. M. Co. supra*.

Insofar as the demurrer of Mrs. Grimes goes to the sufficiency of the complaint to state any cause of action against her, it is clear that she might have objected to the introduction of any testimony or moved to dismiss when plaintiff rested. *Hamilton v. McIndoo*, 81 Minn. 324, 84 N. W. 118. The record shows that she did neither, and hence she should not now be permitted to insist that her demurrer was well taken on that ground.

3. Upon the merits, we think the court was right in holding that the deed from plaintiff to Mrs. Grimes should be set aside. The finding that she paid no consideration for the deed and received delivery with notice through her husband of all the facts surrounding its execution, is well sustained by the evidence. There were confidential relations between plaintiff and her attorney. He had acquired influence over her and had the burden of establishing the perfect fairness, adequacy of consideration and good faith of the transaction in which the deed was obtained. The court found that the reasonable value of the land was \$7,000, and that the total incumbrances against it did not exceed \$4,500. The consideration for the deed was, therefore, inadequate and the transaction cannot be upheld. *Klein v. Borchert*, 89 Minn. 377, 95 N. W. 215; *Garceau v. McNamara*, 125 Minn. 130, 145 N. W. 809, *Ann. Cas.* 1915B, 951. It is but fair to defendant to say that at the trial he offered to show that, up to the time of the commencement of the action, he was at all times ready, willing and able to reconvey the farm to plaintiff upon payment of the money he had expended on account of the purchase price of the land and for taxes, interest and other charges against it, and that the court sustained plaintiff's objection to the making of this proof.

4. The court ordered judgment against the defendant Gordon Grimes for \$200 with interest from May 31, 1916, directed that the defendant Margaret Grimes render an account to plaintiff of the rents and profits received from the land and expenditures made for taxes, interest and the like, and retained jurisdiction for the purpose of such accounting and for the entry of a final decree. The conclusion that plaintiff is entitled to judgment for \$200 against the defendant Gordon Grimes cannot be sustained. We are of the opinion that the statement of the account, so

far as the court has made one, is incorrect and fails to charge plaintiff with all that is properly chargeable against her. We are unable to ascertain to our satisfaction, either from the facts found by the court or from the evidence, how the account stands. There should be a full and complete accounting between the parties, covering all the transactions between them, in which plaintiff should have credit for the rents and profits of her land and should be charged with moneys paid her by defendants, with taxes, interest and other proper expenditures of either defendant on account of liens and incumbrances on the land and repairs and improvements made. In all other respects the findings of fact and conclusions of law are sustained, leaving the accounting between the parties the sole issue for retrial.

The order denying a new trial is reversed and a new trial granted for the sole purpose of settling the accounts between the parties.

G. A. BAKER v. PAUL POLYDISKY AND ANOTHER.¹

October 24, 1919.

No. 21,476.

Findings of court — judge's memorandum.

1. A memorandum by the trial judge filed with the findings may be considered for the purpose of throwing light upon the decision.

Specific performance — doubt as to existence of contract.

2. Specific performance is not of absolute right, but rests in judicial discretion, to be exercised according to settled principles of equity. It should not be granted if it is doubtful whether the contract sought to be enforced was actually made. There must have been a clear accession on both sides to one and the same set of terms.

Same — mistake of legal effect of contract.

3. If a contract was actually concluded, a misunderstanding by either party of its legal effect will not prevent specific performance, provided its terms are the same as they were designed to be, and were those to which the minds of the parties consented as the result of their negotiations.

¹Reported in 174 N. W. 526.

Same — denied when one party is mistaken — option to buy land.

4. If the minds of both parties to a contract meet upon its terms, and those terms are free from ambiguity, in the absence of fraud or misrepresentation, a mistake of one of the parties alone, resting wholly in his own mind, though not ground for rescission, may be good ground for refusing specific performance. Within this principle the trial court was justified in refusing specific performance of an agreement giving to one of the parties an option to buy land.

Case distinguished.

5. The facts in this case are different from the facts in *Caldwell v. Depew*, 40 Minn. 528, and do not charge defendants with negligence, which was the sole cause of their mistake.

Specific performance in accordance with defendant's intent.

6. Although specific performance of a contract, according to its terms, be denied because of a mistake of the defendant, the plaintiff should be permitted, at his election, to take performance of the contract as it was intended by defendant.

Damages unwarranted.

7. The complaint and findings do not afford a sufficient basis for a judgment for damages.

Action in the district court for Becker county for specific performance of a contract for the purchase of certain land. The answer alleged that plaintiff was informed of the mortgages upon the land at the time of the execution of the contract and agreed to assume them and pay in addition thereto the sum of \$2,800. The case was tried before Fish, J., who made findings and ordered judgment in favor of defendants. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

Johnston & Carman and Powell, Carman & Cain, for appellant.

Selover, Schultz & Selover, for respondents.

LEES, C.

Appeal from a judgment for defendants in a suit for specific performance of an option for the purchase of land.

In March, 1917, defendants executed a written instrument, the material portions of which read as follows:

"For and in consideration of the sum of one dollar * * * I here-

by grant unto C. A. Baker an option for 250 days from the 29th day of March, 1917, to purchase for the sum of twenty-eight hundred dollars (\$2,800) the following described lands * * * in the county of Becker and state of Minnesota * * * said C. A. Baker to signify his intention to take or reject the same by due notice in writing within the time above specified. * * * In case said notice shall be served in due time, then 15 days shall be given in which to examine abstract, make deeds and close sale."

This instrument was prepared by plaintiff and mailed to defendants with a check for one dollar and a letter, stating that the option gave plaintiff the right to sell the land, and that he would make a sale for defendants during the summer. An action brought by the United States was then pending, in which it was sought to cancel all conveyances of the land theretofore made. There were two mortgages on the land, one for \$600, and the other for \$120. In their negotiations with plaintiff, defendants fixed the price of the land at \$2,800 and intended that the purchaser should take the title subject to the mortgages. Plaintiff did not learn of them until December, 1917. His understanding of defendants' proposal was that he would get a deed for \$2,800 which would convey the land free from incumbrances. Upon receipt of the option defendants ascertained that it did not in terms provide for a conveyance subject to the mortgages, discussed the omission between themselves, and, without securing advice on the subject, concluded that, if a reference to the mortgages had been necessary to express the true intent of the parties, plaintiff, with whom they were well acquainted, would have inserted it in the agreement, and so they signed it, as it was. In May, 1917, the action brought by the United States was dismissed.

On December 3, 1917, plaintiff mailed to defendants a warranty deed running to himself, with a letter stating that upon the execution and deposit of the deed at any bank, payment of \$2,800 would be made. Defendants caused to be inserted in the deed a clause, whereby the grant was made subject to the mortgage of \$600 and interest, which the grantee was to assume and pay, and then executed the deed and left it with a Minneapolis bank, to be delivered on payment of \$2,800. In the meantime an abstract of title to the land had been sent to plaintiff, who discovered therefrom the existence of the mortgages. Thereupon he depos-

ited \$2,800 in the Minneapolis bank, to be paid to defendants upon the satisfaction of the mortgages and the execution of a new deed, and, upon defendants' failure to execute such deed, deposited the money in court and brought this action.

Prior to December 3, plaintiff made a contract with a purchaser of the land at a price of \$4,160, less the incumbrances. The terms and conditions of the contract were not shown by the evidence. The attempted sale was effected through an agent, to whom plaintiff agreed to pay a commission of five dollars per acre.

The foregoing is a condensed statement of the facts as found by the court, and upon which it was held that plaintiff was not entitled to any relief. No settled case or bill of exceptions was made, hence the sole question before us is whether the conclusions of law are sustained by the findings of fact.

The trial court has found in effect that the minds of the parties never actually met upon one of the material terms of the alleged agreement, one understanding the price to be \$2,800 net to him, the other that it was \$2,800, less the amount of any incumbrances there might be against the land, and on that ground refused specific performance. But plaintiff contends that defendants were guilty of negligence in signing the option, without adding a clause providing that he should pay the mortgages, and that such negligence has been prejudicial to him in view of his resale of the land. Defendants meet this contention by referring to the letter mailed with the option; to their confidence in plaintiff; to the omission from the option of a specific statement that the incumbrances were to be paid by them, and to the fact that they were not versed in the law, and should not be held to know that, by legal intendment, the option required them to convey the land free from all incumbrances.

The trial judge appended a memorandum to the findings, to which we have referred and which we may properly consider as throwing light upon the decision. *Kipp v. Clinger*, 97 Minn. 135, 106 N. W. 108.

1. Specific performance is not of absolute right, but rests in judicial discretion, to be exercised according to settled principles of equity and not arbitrarily with reference to the facts of the particular case. It should never be granted where it is left in doubt whether the party against whom relief is asked made the agreement sought to be enforced

against him. *Hennessey v. Woolworth*, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. ed. 500; *McDermid v. McGregor*, 21 Minn. 111, 116; *Buckley v. Patterson*, 39 Minn. 250, 39 N. W. 490; *Abbott v. Moldestad*, 74 Minn. 293, 77 N. W. 227, 73 Am. St. 348; *First Nat. Bank of Hastings v. Corporation Sec. Co.* 128 Minn. 341, 150 N. W. 1084; *Enkema v. McIntyre*, 136 Minn. 293, 161 N. W. 587, 2 L.R.A. 411; *Fry*, Spec. Perf. § 44; *Pomeroy*, Spec. Perf. of Contracts, § 35. There must have been a clear accession on both sides to one and the same set of terms, in order to justify a court in granting this relief. *Lanz v. McLaughlin*, 14 Minn. 55 (72); *Hamlin v. Wistar*, 31 Minn. 418, 18 N. W. 145; *Langellier v. Schaefer*, 36 Minn. 361, 31 N. W. 690; *St. Nicholas Church v. Kropp*, 135 Minn. 115, 160 N. W. 500, L.R.A. 1917D, 741.

The misunderstanding by either party of the legal effect of the agreement will not prevent specific performance, provided the terms of the agreement are the same as they were designed to be and were those to which the minds of the parties had consented as the result of their negotiations. In *Stong v. Lane*, 66 Minn. 94, 68 N. W. 765, it was held that, if the minds of both parties meet upon the terms of a contract, and those terms are free from ambiguity, in the absence of fraud or misrepresentation, a mistake of one of the parties alone, resting wholly in his own mind, is no ground for rescission, although, in order to create a binding contract, there must be a meeting of the minds of the parties upon its terms. In the present case in the negotiations preceding the execution of the agreement, the minds of the parties did not meet with reference to the price of the land. The option, in form at least, creates a binding obligation on the part of the defendants. Whether it does so in fact, we need not decide, for, as remarked in *Stong v. Lane*, *supra*, an honest mistake of one of the parties may be good ground for refusing specific performance. We hold that, in the exercise of judicial discretion, the district court was justified in refusing it here.

2. The facts differ materially as respects defendants' negligence from those in *Caldwell v. Depew*, 40 Minn. 528, 42 N. W. 479. There the contract expressly stated the nature and amount of the incumbrances against the land, and provided that such amount should be deducted from the purchase price. The court said these provisions were so clear and unambiguous that no man with his senses about him could misapprehend

them. Here the contract is wholly silent as to the incumbrances. Only by legal intendment does it obligate defendants to pay them. It does not appear that they knew they must furnish a marketable title under the terms of the option as written, and hence were bound to deduct the amount of the mortgages from the purchase price. Their lack of experience in business transactions such as this, and their confidence in plaintiff's superior knowledge, are referred to in the trial court's memorandum and afford some excuse for their ignorance. Under the circumstances we think they were not negligent in failing to ascertain the legal effect of the contract before they signed it. Moreover, it was not found that the mistake arose solely through defendants' negligence (and in this respect the case differs from *Caldwell v. Depew*, *supra*), and there is no direct finding that plaintiff has been prejudiced by defendants' alleged negligence. It must appear that plaintiff has been prejudiced by defendants' negligence to entitle him to take advantage of such negligence. *Buckley v. Patterson*, 39 Minn. 250, 39 N. W. 490; 2 *Pomeroy*, Eq. Jur. (4th Ed.) § 856, note on page 1751.

3. Although plaintiff is not entitled to specific performance of the contract according to its terms, we think he is entitled, at his election, to take performance of the contract as it was understood by defendants. In other words, he may, at his option, adopt defendants' version of their agreement with him and have its specific performance decreed in accordance with defendants' understanding. *Fry*, Spec. Perf. §§ 767-773; *Pomeroy*, Spec. Perf. of Contracts, § 252; *Park v. Johnson*, 4 Allen, 259-264; *Keim v. Lindley* (N. J. Ch.) 30 Atl. 1063-1081; *Anderson v. Kennedy*, 51 Mich. 467, 16 N. W. 816.

4. It may be that plaintiff would be entitled to damages if specific performance were wholly denied. *Stong v. Lane*, *supra*. Without so deciding, we hold that there is nothing in the complaint or findings upon which to base a judgment for damages in the present action.

Plaintiff has not asked for specific performance of the contract as understood by defendants, and hence is not entitled to a reversal, but he should have the right to apply to the trial court, if so advised, for a modification of the judgment so that it will grant specific performance in the qualified form above referred to. The judgment is affirmed with-

out prejudice to plaintiff's right so to apply for a modification thereof.
Affirmed.

STATE EX REL. P. C. WESTERGAARD v. DISTRICT COURT OF
STEARNS COUNTY.¹

October 31, 1919.

No. 21,160.

Drainage of meandered lake.

1. The drainage of a meandered lake is forbidden, unless it be of the class authorized to be drained by section 5523, G. S. 1913, as amended.

Same — not authorized by statute.

2. Evidence considered and *held* to establish that Crow lake in Stearns county is not within the class of lakes authorized to be drained by that statute. The case of *In re County Ditch No. 34 in Sibley County*, 142 Minn. 37, 170 N. W. 883, followed and applied.

Upon the relation of P. C. Westergaard the supreme court granted its writ of certiorari directed to the district court for Stearns county, to review an order of that court, Roeser, J., establishing Judicial Ditch No. 3 in Stearns and Kandiyohi counties, insofar as the same affects the drainage of Crow lake. Reversed.

Sam G. Anderson, for relator.

Frank Tolman and *J. D. Sullivan*, for respondent.

TAYLOR, C.

Certiorari to review an order establishing a judicial ditch in Stearns and Kandiyohi counties. The proposed ditch begins in Crow lake in the town of Crow Lake in Stearns county and extends into Kandiyohi county for several miles and has several branches. If constructed as proposed it will drain Crow lake entirely, and the sole question presented is whether this lake is of such a character as to bring it within the class of lakes which are permitted to be drained by section 5523, G. S. 1913, as amended.

¹Reported in 174 N. W. 522.

Section 8949, G. S. 1913, makes it a criminal offense to drain a meandered lake unless such drainage is authorized by law. Section 5523, G. S. 1913, as amended, gives authority "to drain in whole or in part, meandered lakes which have become normally shallow and of a marshy character, or which are no longer of sufficient depth or volume to be of any substantial public use for fishing, boating or water supply."

Crow lake is a meandered lake having an area of something over 500 acres and a shore line of something over five miles. Portions of the shore line are well defined with high wooded banks; other portions are low, marshy and ill-defined. The depth of the water is less than four feet on the average, but is six or seven feet in places. The lake has no inlet, but is fed in part by springs along the northwesterly shore. The outlet has become obstructed, and water flows out only at times of high water. The bottom of the lake is "muck" and is entirely covered by water plants which grow below the surface of the water. Rushes and other water plants grow above the surface in portions of the lake, but more than half of its area is clear, open water. Boats have been kept and used on the lake for many years. Wild ducks frequent the lake in the fall, and are hunted upon it in the shooting season. Coarse fish are taken from it by spearing through the ice in the winter. It supplies most of the ice used in the village of Belgrade. It furnishes the water supply for the stock on several farms adjoining it. One farmer has installed a pumping plant, by which he pumps the water and "muck" from the bottom of the lake onto his land, which both irrigates and fertilizes it and thereby increases its productiveness.

Those who favor draining the lake insist that the depth and volume of the water is gradually lessening, and that the water has become stagnant, malodorous and unfit for use for any purpose. This is denied by those who oppose draining it. A majority of the residents around the lake oppose draining it. Those who oppose draining it own nearly two-thirds of the shore line and would obtain more than half the land which would be reclaimed by such drainage.

The laws applicable to such lakes received careful and extended consideration in the case of *In re County Ditch No. 34*, 142 Minn. 37, 170 N. W. 883, decided since the trial of the instant case. The lake involved in that case was quite similar, in essential respects, to the lake involved in

this case, and we find no substantial ground for making a distinction between them. The reasons for reaching the conclusion that such lakes are not within the class of lakes which the statute permits to be drained, are stated so fully in that case that it is unnecessary to repeat them here.

The respondents argue that the decision in the Sibley county case was based on the ground that the Sibley county ditch would only partially drain the lake there involved, and that such partial drainage would destroy the usefulness of the lake and aggravate the objectionable conditions without benefiting the public, and is not controlling in this case for that reason. The opinion discusses these matters, among others, but the decision was placed on the ground that the lake "is not such a body of water as is subject to drainage within the meaning" of the statute.

The relator, through his attorney, filed a brief, setting forth his contention in proper and appropriate language. Another landowner, who opposes the draining of the lake, has filed a so-called brief prepared by himself, which the respondents move to strike from the files as scurrilous and abusive. An examination of this brief shows that, while it contains practically nothing that can be of assistance in the solution of the questions presented, it contains numerous unseemly and unjustifiable aspersions, for which there is not the slightest foundation in the record, upon nearly all those who had duties to perform in the drainage proceedings including the trial court, and for this reason it is stricken from the files.

For the reason that we are of opinion that Crow lake is not within the class of lakes which the statute permits to be drained, the order establishing the ditch is reversed, but this reversal does not bar any proper proceedings for carrying out the remainder of the drainage project. *Mundwiler v. Bentson*, 128 Minn. 69, 150 N. W. 209.

LICENSED RETAIL LIQUOR DEALERS ASSOCIATION OF
MINNEAPOLIS v. L. R. DENTON.¹

October 31, 1919.

No. 21,376.

Appeal and error — denial of motion proper.

1. There was no error in denying the defendant's motion to amend his answer at the trial by specifically denying that the plaintiff was a corporation.

Exclusion of evidence proper.

2. Two questions were asked calling for conclusions; and one was asked as to which it was at least doubtful whether the witness was qualified to testify. No offers were made to show what the proofs would be. There was no error in sustaining objections to the questions.

After the former appeal reported in 140 Minn. 461, 168 N. W. 553, the case was tried before Montgomery, J., who granted plaintiff's motion for a directed verdict for \$86.20. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Edward M. Nash, for appellant.

Brady, Robertson & Bonner, for respondent.

DIBELL, J.

Action on promissory notes made by the defendant to the plaintiff. There was a verdict directed for the plaintiff and the defendant appeals from the order denying his motion for a new trial.

1. The case was here before and is reported in 140 Minn. 461, 168 N. W. 553. There the order of the court striking out the defendant's answer as sham was sustained. The defendant filed an amended answer. He moved for a specific amendment before trial and that was allowed. At the trial he asked to amend by specifically denying the incorporation of the plaintiff as is required by statute in order to make an issue. G. S. 1913, § 7774. This was denied and error is assigned. The allowance of

¹Reported in 174 N. W. 526.

144 M.—6.

the amendment was discretionary. Nor does it seem likely that it was material. *Moorman Mfg. Co. v. Haack*, 135 Minn. 126, 160 N. W. 258, and cases cited. There was no error.

2. The other errors available on the record are referred to in the third assignment of errors and relate to three questions asked of the defendant to which objections were sustained:

"What were these notes given in payment for at the time you signed them?"

"For what purpose was the money to be used which these notes were to be given for?"

"What representations did the committee, officers or agents of the association make to you at the time you signed these notes?"

The first two invited conclusions and not facts or conversations. It does not appear that there was a committee, as assumed in the third question, nor that the plaintiff knew the officers and agents of the association. The contrary, if anything, appears. No foundation was laid. There was no effective offer to prove. The court is not strict in its holdings as to conclusions nor as to the necessity of offers of proof, but error must affirmatively appear to justify a reversal and none does.

Order affirmed.

WHITFORD M. HALL v. IDA M. CROOK.¹

October 31, 1919.

No. 21,387.

Convict — property rights not forfeited by conviction and sentence — covenant.

The plaintiff in March, 1910, conveyed to the defendant, his niece, certain premises, in consideration of her giving him care, support and a home during life and burial after death. The obligation to give care, support and a home was made an express lien on the premises, but not so the obligation to give burial. After the partial execution of the agreement, and about October 1, 1910, the plaintiff wrongfully killed the defendant's husband. In December, 1910, he was convicted of murder in the second degree and sentenced to life imprisonment. He was

¹Reported in 174 N. W. 519.

pardoned in July, 1916. This action was brought after the pardon to cancel the deed. It is *held*:

(1) That under the Constitution providing that there shall be no forfeiture of estate for conviction of crime and the statute providing that one sentenced to life imprisonment shall be deemed civilly dead, the plaintiff did not by his sentence forfeit his property rights.

(2) The deed contemplated that the plaintiff should have a home with the defendant upon the premises conveyed and that he should there receive from her care and support. By his wrongful act in killing her husband he rendered it impossible for her to perform in the spirit contemplated her agreement to give him a home and care and support, and thereby he forfeited his right to claim performance after pardon.

(3) The plaintiff's wrongful act did not affect the obligation of the defendant to give proper burial, but such obligation rests upon a personal covenant and is not a charge upon the land.

Action in the district court for Blue Earth county to cancel a deed. The case was tried before Comstock, J., who made findings and as conclusion of law found that defendant was the owner of the land conveyed. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

C. J. Laurisch, A. R. Pfau, Jr., and H. A. Johnson, for appellant.

Walter A. Plymat and Hiram Goff, for respondent.

DIBELL, J.

This is an action to cancel a deed made by the plaintiff to the defendant. There was a judgment for the defendant, adjudging that the defendant was the owner of the premises described in the deed "released and free from any claim, lien, title or interest of the plaintiff." The plaintiff appeals.

The plaintiff is a widower and an uncle of the defendant. On March 26, 1910, he conveyed to her certain premises in Blue Earth county in consideration of his support during life and his burial at a designated place upon his death. The portion of the deed giving the understanding of the parties is as follows:

It is hereby understood and agreed between the parties to this conveyance that as part of the consideration above mentioned the grantee herein named shall provide at her own cost and expense a home for the said

grantor, Whitford M. Hall, upon the premises herein described and conveyed, for and during the term of his natural life, and that during said time she shall provide him with all the necessities of life, including medical care and treatment in time of sickness or accident, and at his death shall give him a decent burial in the Elm Township Reserve Church burial ground near Diller, Nebraska, and it is further specifically agreed between the parties hereto that the rights of the said grantor, Whitford M. Hall, to a home upon such premises, and to such support, shall be and is hereby constituted a specific lien upon the lands and premises herein described and conveyed, and it is further understood and agreed that if at any time said Whitford M. Hall desires to absent himself from said premises for the purpose of visiting friends living elsewhere or for any other purpose, such absence shall not be deemed an abandonment of any of his rights hereunder, provided, that during the time or times that said Whitford M. Hall may be so absent from the home of said second party, she shall be relieved from furnishing him his living and support until he returns."

Upon the execution of the deed the plaintiff made his home with the defendant until October 1, 1910, when he shot and killed her husband. On December 10, 1910, he was convicted therefor of murder in the second degree and sentenced to imprisonment for life. On July 11, 1916, he was pardoned.

1. The only substantial question is upon the portion of the judgment which in effect determines that the defendant holds the premises conveyed discharged of all obligation on the part of the defendant.

It is the contention of the defendant that upon the plaintiff's conviction he was civilly dead, and so the statute is, and that from then on she held the land discharged of all obligation. This contention is not sustained.

The Constitution provides that no bill of attainder shall be passed and that no conviction shall work corruption of blood or forfeiture of estate. Const. art. 1, § 11. The statute provides that "a person sentenced to imprisonment for life is thereafter civilly dead." G. S. 1913, § 8493.

We leave a full consideration of the Constitution and the statute until a case comes needing it. The plaintiff's sentence and imprisonment did not have the effect, because of the statute making him civilly dead, of

forfeiting his property rights and putting the premises conveyed in the defendant as if he had come to a natural death. This much is clear.

2. The deed contemplated that the plaintiff should have care and support at the home of the defendant upon the premises conveyed. Fairly construed it intended something in the way of personal care and attention on her part. When he killed her husband he made impossible the further performance of the contract by her in the spirit in which it was intended. He cannot take advantage of the impossibility of performance which he has created and his right to care and support are gone and with them the lien given therefor by the deed.

3. The plaintiff desired that his burial be at a church burial ground of his choice in Nebraska. The defendant's agreement to give such burial was a part of the consideration of the deed, and a substantial part. The reasons that forfeit his claim to care and support do not affect her contract obligation to give him burial. His right to a home and support is made a specific lien upon the premises conveyed. The obligation to give burial, though stated in immediate connection with the obligation to give care and support and a home, is not made a lien. The parties might well enough choose to provide a lien for the right to a home and support and not care to extend it to the obligation to give burial. This is the result of the language of the contract. The obligation remains, but it rests upon a personal covenant of the defendant. It does not affect the land. If ever broken the remedy will be a personal action. The judgment barring the plaintiff from all claim to the land is therefore right. The obligation to give care and support and a home is gone, and the obligation to give burial does not affect the land.

The writer is disposed to think that the obligation to give burial should be enforceable against the land, if there is a breach and occasion requires. This court, in common with other courts, treats contracts for support as of a class by themselves, and if there is a breach relief is afforded by cancelation or charging a lien or by such other relief as the facts justify. 1 Dunnell, Minn. Dig. and 1916 Supp. § 2677, and cases cited. The particular words used are not very important if the purpose of the parties is clear, and the courts are quick to give effect to the intent of the agreement. If the plaintiff had died a natural death, without having forfeited his right to a home and support, and the defendant had

abided by her agreement until his death, and had then declined to keep her covenant to give burial, it seems to the writer that the expenses of burial could be charged against the land. The situation here is not different, for by his wrong the plaintiff forfeited no more than his right to a home and support and care.

Justice Holt concurs in the views of the writer relative to the covenant as to burial, and their view would result in a modification of the judgment.

Judgment affirmed.

STATE v. CLEMENS GAULARPP.¹

October 31, 1919.

No. 21,402.

Assault and battery — verdict sustained.

1. The evidence is sufficient to sustain the verdict of assault in the second degree.

Same — omission to request submission of question of degree to jury.

2. The evidence was such that it was for the jury to determine whether the offense committed by defendant was of a lesser degree than the one named in the indictment and verdict, but no error can be predicated upon the failure to submit that question to the jury, for the record does not show a request to submit the same, or any objection, made before the jury retired, to the charge on that score.

Defendant was indicted by the grand jury of McLeod county charged with the crime of assault in the second degree, tried in the district court for that county before Tift, J., and a jury which found him guilty as charged in the indictment. From an order denying his motion for a new trial, defendant appealed. *Affirmed.*

John J. Fahey, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, *Linus O'Malley* and *William O. McNelly*, for respondent.

¹Reported in 174 N. W. 445.

HOLT, J.

The defendant was convicted of assault in the second degree, and appeals from the order denying a new trial.

The indictment charged defendant with having wilfully and wrongfully committed an assault inflicting grievous bodily harm upon one A. R. Roper. The testimony shows that, after supper on December 7, 1918, defendant, employed by a farmer near Glencoe, accompanied a neighboring farmer's son into town. Defendant visited stores and saloons with one or more of the young men whom he met, and had several drinks of beer and whiskey. At about 11:30 in the evening, as he and three companions walked north in front of the Commercial Hotel, they met Mr. Roper, recognized by defendant as the person who, some four weeks previously, had accosted him as a Hun. In passing, defendant struck Roper. Roper says he was struck a crushing blow which caused him to fall unconscious to the sidewalk, that he staggered to his feet, and, after walking a few steps, fell a second time. He received a cut less than an inch in length on the chin. Back of the right ear and around one ankle painful swellings indicated an injury. There was no bruising of tissues except on the chin. Roper claimed that for a time he suffered great pain in masticating his food, and thought his hearing somewhat affected.

Defendant admits giving Roper a slap, but says it was done with the open hand. From the testimony of the physician, called in the afternoon of the next day to treat Mr. Roper, a jury could readily find that but one blow was struck with the naked hand, that the cut on the chin and the other visible marks of injury could have been received in falling, and that there was no impairment of the functions of the ear, except, perhaps, a temporary dullness. Neither Mr. Roper nor the physician was prepared to assert that defendant's testimony that but one blow was struck was untrue.

Only two assignments of error require consideration, viz.: (1) That the evidence does not support the conviction of assault in the second degree; and (2) that a new trial should have been granted because the court failed to submit assault in the third degree to the jury.

We cannot hold, as a matter of law, that the evidence does not fairly sustain the verdict rendered. What is a grievous or serious bodily harm is ordinarily a jury question, to be determined in view of the facts sur-

rounding the assault and the consequences thereof on the victim. Accepting at its full value Mr. Roper's recital of the pain suffered and his say-so that he has not fully recovered the health he enjoyed prior to the assault, the jury might well conclude that grievous bodily harm was inflicted.

But we are also clear that the evidence presented a case justifying the submission to the jury of defendant's guilt of assault in the third degree. The jury could well find that there was no serious or grievous bodily harm done Mr. Roper. Pain, superficial or trivial wounds and temporary impairment of some organ of the body are experienced by the victim in most of the ordinary assault and battery cases that do occur. But the presence of one or all of such results does not, as a matter of law, bring them within second degree assaults. From the testimony in this case the jury could well come to the conclusion that neither the blow struck by defendant, nor its consequences, indicated a greater offense than a third degree assault. We cannot accept the suggestion of counsel for respondent, that *State v. Damuth*, 135 Minn. 76, 160 N. W. 196, is authority for holding that no lesser degree of crime than assault in the second degree could have been submitted to the jury in the case at bar. The cases are not parallel. There an eye, one of the most useful members of the body, was totally destroyed and lost. The effect upon the victim of the assault was permanent and serious. Opinions could not well differ as to its being a grievous bodily injury or harm.

Although of the opinion that the jury should have been allowed to determine whether the defendant was guilty of third degree assault, we think he is in no position to take advantage thereof on this appeal. His counsel admits that the record is silent as to any request to submit a lesser degree of crime than the one charged in the indictment, and that it does not show that at the trial the court's attention was called to the defect now urged. We are not permitted to consider statements as to what passed between court and counsel which are not incorporated in the settled case, and must treat the question now discussed as being first presented in the motion for a new trial. It is thoroughly settled in this state that a failure to instruct on a particular phase presented by the evidence is not reversible error in the absence of a request to instruct thereon, or an objection, before the jury retires, apprising the court that an

omission has been made in the charge which the party desires supplied. The rule is very fully considered in *State v. Sailor*, 130 Minn. 84, 153 N. W. 271, and *State v. Johnson*, 37 Minn. 493, 35 N. W. 373, therein cited, is directly in point upon the omission to charge upon a lesser degree of crime than the one named in the indictment.

It is readily conceivable that a defendant charged with assault in the second degree should deem his chance of acquittal more probable if the jury were not given the alternative of finding him guilty of a lesser offense, and hence he keeps silent when the court omits to submit the lesser degree. Of course, if erroneous instructions are given, advantage thereof may be taken on the motion for a new trial, under our present practice, even though not excepted to at the trial, and that was the situation in *State v. Hutchison*, 121 Minn. 405, 141 N. W. 483, and *State v. Almos*, 122 Minn. 479, 142 N. W. 801, relied on by defendant. *State v. Rusk*, 123 Minn. 276, 143 N. W. 782, also cited by him is in line with *State v. Sailor*, *supra*.

Upon the record as we find it there is no prejudicial error.
Order affirmed.

IN THE MATTER OF THE APPEAL FROM PROBATE COURT,
ETC.

JOHN HAYFORD AND OTHERS v. W. F. DAUGHERTY, AS
EXECUTOR.¹

October 31, 1919.

No. 21,432.

What constitutes a statutory "claim" against an estate.

A pecuniary obligation, imposed upon the estate of a deceased person by a contract made in his lifetime, constitutes a "claim" within the meaning of the statutes for the presentation and allowance of claims against such estates, G. S. 1913, § 7323, even though it could not be enforced against decedent in his lifetime.

¹Reported in 174 N. W. 442.

Action in the district court for Pope county to recover \$1,200. The facts are stated in the opinion. The executor's demurrer to the complaint on the grounds that the court had no jurisdiction of the subject matter; that there was a defect of parties defendant; that there was a defect of parties plaintiff; that the facts stated in the complaint did not constitute a cause of action; and that the probate court was without jurisdiction to hear, consider and determine the claim referred to in the complaint, was overruled. The case was tried before Flaherty, J., who when plaintiffs rested denied defendant's motion to dismiss the action, and at the close of the testimony motions of the plaintiffs and defendant respectively for directed verdicts in their favor, and a jury which returned a verdict for \$1,185. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, the executor appealed. Affirmed.

Julius O. Grove, and James B. Ormond, for appellant.

E. M. Webster and Henry T. Ronning, for respondents.

BROWN, C. J.

Lucitta Kinney Jones, late of Pope county, died on the eleventh day of May, 1915, leaving what purported to be her last will and testament, which was subsequently allowed as such by the probate court. Appellant herein was duly commissioned executor and duly qualified and entered upon the discharge of his duties. Respondents appeared in the probate court and presented a statement of facts in and by which they asserted a claim against the estate in the sum of \$1,200. To this statement or claim the executor interposed an objection, on the ground that the facts set forth therein did not constitute a "claim" within the meaning of our statutes on the subject of the allowance of claims against the estates of deceased persons, namely, G. S. 1913, § 7323, et seq. The probate court overruled the objection, heard the matter on the merits and allowed the claim. The executor appealed to the district court, where the questions presented were submitted to a jury, and a verdict returned in favor of respondents for the sum of \$1,000 and interest. The executor appeals from an order denying a new trial.

The only question raised or presented is whether the facts relied upon by respondents constitute a "claim" against the estate within the mean-

ing of our probate law. The facts made the basis of the claim are set out in the complaint which was filed in the cause after the appeal to the district court as follows:

"That some time prior to the death of the said Susan Hayford and during the lifetime of the said Lucitta Kinney Jones, her daughter, the said Susan Hayford, her mother, in consideration of love and affection, loaned to the said Lucitta Kinney Jones the sum of twelve hundred dollars upon the understanding and agreement that the said Lucitta Kinney Jones was to have and keep the possession thereof and have the use thereof as long as the said Lucitta Kinney Jones should live, and with the agreement and understanding together each with the other that upon the death of the said Lucitta Kinney Jones the said sum of twelve hundred dollars, in consideration of love and affection for her children herein mentioned, should be and was to be turned over and paid to and to become the property of her other children;" namely, respondents in this action.

The trial court held that the contract and agreement, if in fact entered into as alleged in the complaint, vested in respondents a right to the money on the death of decedent, and constituted a claim against her estate within the meaning and purpose of our statutes in such cases provided, and submitted the evidence to the jury to determine the facts.

Without stopping to consider a question that might arise on a similar state of facts, but not here raised or presented, namely, whether the beneficiaries under such a contract, being strangers to the transaction, may enforce the same by proceedings at law or otherwise, 6 R. C. L. 882 and 892, we concur in the view of the trial court that the facts here disclosed constitute a claim against the estate, properly presentable in the probate proceedings. The transaction took the form of a loan of money by Mrs. Hayford to her daughter, Mrs. Jones, to be retained by the latter during her life, the money then to become the property of and to be paid over to the other children of Mrs. Hayford. By the acceptance of the loan Mrs. Jones assumed the obligations thereof and her estate necessarily became charged with the performance of the stipulation that the money should then "be paid to and become the property of" the respondents. It was a pecuniary obligation and created a claim against her estate within the meaning of our statutes on the subject. *Winston v. Young*, 52 Minn. 1,

53 N. W. 1015; In re Hess' Estate, 57 Minn. 282, 59 N. W. 193; Wagner v. Seaberg, 138 Minn. 37, 163 N. W. 975. It is not important that the claim could not have been enforced against decedent, Mrs. Jones, in her lifetime. It is sufficient that it was an obligation imposed upon her, charging her estate with liability therefor. The case of Knutsen v. Krook, 111 Minn. 352, 127 N. W. 11, 20 Ann. Cas. 852, is not opposed to this view of the question. In stating the general rule on the subject in that case there was no intention of holding that a "claim" within the probate statutes must be one that may be enforced against the decedent in his lifetime.

The suggestion of appellant that the transaction took the form of a trust is not sustained. Such was not the purpose of the parties.

Order affirmed.

JOSEPH McCOY v. MALCOLM E. GRANT AND ANOTHER.¹

November 7, 1919.

No. 21,373.

Appeal and error — record incomplete — findings of fact.

1. Where the settled case fails to show that it contains all the evidence bearing on the matters presented for review, this court must take it for granted that the evidence justified the findings of fact and did not conclusively establish other facts not found.

Decision sustained by findings.

2. The findings of fact sustain the conclusions of law and no reversible errors appear.

Action in the district court for Hennepin county to recover \$320. In his separate answer Malcolm E. Grant set up as a defense the facts stated in the third paragraph of the opinion. The case was tried before Steele, J., who made findings and ordered judgment for \$350. From an order denying his alternative motion for amended findings or for a new trial, defendant Malcolm E. Grant appealed. Affirmed.

Hoke, Krause & Faegre, for appellant.

Colfax Grant and *W. H. Adams*, for respondent.

¹Reported in 174 N. W. 728.

TAYLOR, C.

Plaintiff, an architect of the city of Minneapolis, set forth two causes of action in his complaint: The first for services in preparing preliminary sketches or plans for a dwelling house for defendants which were not accepted or used; the second for the value of the use of the plans and specifications under which the building was constructed. The court made findings of fact and conclusions of law to the effect that plaintiff was not entitled to recover upon either cause of action against defendant Helen J. Grant, but was entitled to recover the sum of \$50 upon the first cause of action, and the sum of \$300 upon the second cause of action against defendant Malcolm E. Grant. Malcolm E. Grant, who hereafter will be designated as defendant, appealed from an order denying his alternative motion for amended findings or for a new trial.

The record contains a settled case, but it does not appear either from the settled case, or from the attached certificate of the trial judge, that it contains all the evidence received at the trial, or all the evidence bearing on the questions, or any of them, sought to be raised on the appeal. Error is not presumed, and, as the record fails to show that it contains all the evidence bearing thereon, this court cannot hold that the findings of fact are unsupported by the evidence, or that the evidence established any facts other than those found. Dunnell, Minn. Dig. §§ 345, 352.

In 1915 defendant employed plaintiff as an architect to devise and prepare plans and specifications for a dwelling house, and to superintend the construction of it. Plaintiff devised and prepared the plans and specifications for the building and superintended its construction, and defendant paid him the sum of \$700 in full therefor. Thereafter defendant sold this house and desiring to erect another had plaintiff prepare some preliminary sketches and plans. These were rejected as unsatisfactory, and defendant concluded to use the plans for the first house in building the second. Neither plaintiff nor defendant had the blue prints used in constructing the first house, but plaintiff had the original drawings or tracings from which the blue prints had been made. Defendant procured these tracings from plaintiff and had new blue prints made, which he used in constructing the second house. He insists that, having paid plaintiff for his services in devising and preparing the plans and specifications for his former house, they had become his property, and

he had the absolute right to make any use of them he saw fit without compensating plaintiff therefor. It is probably true that one who employs an architect to devise and prepare plans and specifications for a building and pays him therefor becomes the owner of such plans and specifications, unless the contract provides that they are not to become his property. *Gibbon v. Pease*, 2 Ann. Cas. 713, and cases cited in note. But the court found as a fact that plaintiff was the owner of the plans in controversy, and that defendant procured them for use in constructing the second house under an agreement to pay plaintiff for them. For the reasons already stated defendant is not in position to attack these findings and they must stand. They establish plaintiff's right to recover on the second cause of action.

The specifications accompanying the plans contained a statement to the effect that all drawings and specifications were the property of plaintiff and were to be returned to him. Defendant insists that this statement was not a part of the contract and was not binding upon or evidence against him, and that the court erred in admitting this provision of the specifications in evidence. Whether this provision was binding upon or evidence against defendant depends upon the facts and circumstances shown by the evidence. As it does not appear that all the evidence is before us, we are not in position to say that the ruling was error. But, if we were to concede that this provision was not evidence against defendant, we must take it for granted that the finding of the court was warranted by other evidence.

Copies of the plans and specifications had been filed with the building inspector as required by the building regulations of the city, in order to obtain a permit for the construction of the first house. Defendant contends that they thereby became public records and that in consequence thereof plaintiff lost all property rights in them. It is not necessary to determine the effect of such filing, for plaintiff and defendant could contract that as between themselves plaintiff should remain the owner of the plans and specifications and defendant should not use them again without paying therefor. And in view of the findings of the court we must take it for granted that plaintiff procured them for the second building under a valid contract to pay for them.

Defendant also contends that the specifications were not used in the

construction of the second house, that there is no evidence of the value of the use of the plans without the specifications, and therefore that the award of \$300 on the second cause of action is without support in the evidence. He further contends that the preliminary sketches were made under an agreement that no charge should be made therefor unless they were accepted and used, and as they were rejected that plaintiff is not entitled to recover on the first cause of action. For the reasons already stated these contentions cannot be sustained. We find no reversible errors and the order must be and is affirmed.

WILLIAM F. BEHSMAN v. EDNA M. BEHSMAN.¹

November 7, 1919.

No. 21,390.

Divorce — epilepsy of defendant — evidence insufficient.

1. In an action to annul a marriage contract upon the ground that one of the parties thereto was an epileptic at the time of the marriage, proof that the defendant was an epileptic at the time of such marriage is not, in the absence of a showing of fraud on the part of the afflicted party in concealing the epileptic condition, sufficient to warrant a decree of annulment.

Epilepsy not a ground for annulment of marriage.

2. The legislature, not having prescribed epilepsy as a ground for annulment of marriage, and the courts of the state never having recognized that disease as a cause for nullifying a marriage contract, the judgment of the trial court denying such relief is justified, notwithstanding a finding of fact that the defendant was an epileptic at the time of the marriage.

Action in the district court for Steele county to annul a marriage. The answer alleged the insanity of defendant. The case was tried before Childress, J., who made findings and as conclusion of law found that plaintiff was not entitled to have the marriage annulled, but that he was entitled to the custody of the children. From the judgment entered pur-

¹Reported in 174 N. W. 611.

suant to the order for judgment, plaintiff appealed. Affirmed.

Moonan & Moonan, for appellant.

A. W. & F. W. Sawyer, for respondent.

QUINN, J.

Plaintiff and defendant have been residents of this state since their birth. They were married in June, 1907. They lived together as husband and wife until shortly prior to September, 1915, when the defendant, by reason of and as a result of epilepsy, was adjudged insane and committed to the hospital where she has since been detained. There are three children the issue of such marriage, of the ages of eight, five and three years, but they do not appear to be afflicted with such malady.

An examination of the record as returned leads us to the conclusion that the trial court was right in denying the relief asked for in the complaint. The findings of the trial court are, in effect, that the parties were married on June 7, 1907; that the issue of such marriage is three children; that the defendant is and has been ever since she was two years of age an epileptic; that said disease continued to grow on the defendant until September 3, 1915, when she became insane and was committed to the hospital for the insane at Rochester; that the defendant is becoming more irrational and violent and is not expected to improve in her condition; that the plaintiff and defendant lived together as husband and wife until shortly before defendant became insane; that plaintiff did not know that the disease with which defendant was afflicted was epilepsy until about September 3, 1915, and that this action was commenced in November, 1918.

As conclusions of law the court found that plaintiff is not entitled to have said marriage annulled and set aside, but that he is entitled to the custody of said children.

Plaintiff brings this action to annul the marriage, alleging solely, that at the time of such marriage and long prior thereto and ever since, defendant was an epileptic, all of which was unknown to plaintiff. There is no allegation or contention that the defendant, in any manner, attempted to conceal her real ailment from the plaintiff, nor that she knew or had any conception of the nature of the malady with which she was afflicted. The question then is, whether a marriage is voidable upon the

sole ground that one of the parties thereto was an epileptic at the time of the marriage, in the absence of any showing of fraud or concealment and where it does not appear that the defendant ever knew that her trouble was epilepsy.

Section 7090, G. S. 1913, provides that: "No marriage shall be contracted while either of the parties has a husband or wife living; nor within six months after either has been divorced from a former spouse; nor between parties who are nearer of kin than second cousins, whether of the half or whole blood, computed by the rules of the civil law; nor between persons either of whom is epileptic, imbecile, feeble-minded or insane."

Section 7106 of the statute provides that all marriages which are prohibited by law on account of consanguinity, or on account of either party having a former husband or wife then living, if solemnized within this state, shall be absolutely void, and section 7107 provides that when either party to a marriage is incapable of assenting thereto for want of age or understanding, or when the consent of either has been obtained by force or fraud, and there is no subsequent voluntary cohabitation of the parties, the marriage may be annulled and shall be void from the time its nullity is adjudged.

It will be observed that the legislature has not prescribed epilepsy as a ground for annulment of marriage, nor have the courts of this state recognized that disease as cause for nullifying the marriage contract. Apparently the defendant was in such state of health at and subsequent to the time of her marriage, that plaintiff lived with her for eight years, raised a family of three children before discovering the nature of the malady under which she was laboring. She had concealed nothing from the plaintiff as to her ailments. We are of the opinion that the judgment should stand.

Affirmed.

ABRAHAM MOSKOVITZ v. THE TRAVELERS INDEMNITY
COMPANY.¹

November 7, 1919.

No. 21,396.

Insurance against burglary — exception — construction of policy.

The defendant issued to the plaintiff a policy of burglar insurance by which it promised indemnity against loss by felonious entry into his safe by actual force of which there were visible marks upon the safe by tools or explosives, etc. Liability was excluded if entry was effected by opening the door by a key or the manipulation of the lock. The plaintiff sustained a loss. The entry of the outer door was effected by the manipulation of the lock. The entrance through the inner door was effected by the use of a hammer and chisel, and there were visible marks of the forcible entry. It is *held* that the defendant is liable on the policy.

Action in the municipal court of St. Paul to recover \$396.82 upon defendant's burglary policy. The case was tried before Finehout, J., who made findings and ordered judgment in favor of plaintiff for the amount demanded. From an order denying its alternative motion for amended findings or for a new trial, defendant appealed. Affirmed.

Hoke, Krause & Faegre, and *L. N. Foster*, for appellant.

Thomas J. Newman, for respondent.

DIBELL, J.

Action on a policy of burglary insurance issued by the defendant to the plaintiff. There were findings for the plaintiff and the defendant appeals from the order denying its motion for a new trial.

By the policy the defendant promised as follows:

"To indemnify the assured for all loss by burglary occasioned by the abstraction of any of such property from the interior of any safe or vault described in the declarations and located in the assured's premises, by any person or persons making felonious entry into such safe or vault by

¹Reported in 174 N. W. 616.

actual force and violence of which force and violence there shall be visible marks made upon such safe or vault by tools, explosives, chemicals or electricity."

In certain instances, of which we note two, there was an exclusion of liability though there was an entry and burglary:

"Nor unless all vault, safe and chest doors are properly closed, and locked by a combination or time lock at the time of the loss or damage; *nor if effected by opening the door of any vault, safe or chest by the use of a key or by the manipulation of any lock.*"

The italicized exclusion is the important one. The other is quoted to show the context.

The plaintiff sustained a loss by burglary from his safe. There was no actual force or violence used in effecting entry through the outer door nor were there any visible marks made upon it. Entrance through it was effected by a manipulation of the lock. The lock of the inner door was broken by the use of a hammer and chisel and the lock was knocked off. There were visible marks of the entry through the inner door.

The contention of the insurance company is that to charge it there must have been an entry through the outside door by force and violence of which there were visible marks by tools, and that if the outside door was entered by a manipulation of the lock there can be no recovery though the inner door was broken open by the use of tools which left visible marks. It cites in support of its contention: *Blank v. National Surety Co.* 181 Iowa, 648, 165 N. W. 46, L.R.A. 1918B, 562; *Brill v. Metropolitan Surety Co.* 113 N. Y. Supp. 476; *Frankel v. Massachusetts Bonding & Ins. Co.* (Mo. App.) 177 S. W. 775; *First Nat. Bank v. Maryland Casualty Co.* 162 Cal. 61, 121 Pac. 321, Ann. Cas. 1913C, 1170; *Maryland Casualty Co. v. Ballard*, 134 Ky. 354, 120 S. W. 301. The Iowa case gives a legitimate foundation for its contention, though the policy there involved is somewhat different. The other cases involved policies which distinguish them.

The plaintiff's contention is that liability arises when there is an entry by actual force through the inner door by tools, of which visible marks are left, though entrance through the outer door is effected by a manipulation of the lock and no marks of force are upon it. This contention finds support in *T. J. Bruner Co. v. Fidelity & Casualty Co.* 101 Neb.

825, 166 N. W. 242, and *Fidelity & Casualty Co. v. Sanders*, 32 Ind. App. 448, 70 N. E. 167, and we sustain it.

The policy is not quite clear. The rule of construction favors the insured and resolves ambiguities against the insurer. It was proper, and not difficult, to write a policy making a forcible entry through the outside door attended by visible marks a prerequisite of liability. If the insurance company intended to offer the plaintiff such a policy it could have made its meaning sufficiently clear by the use of a few apt words, and, wishing its liability thus limited, it should have done so.

Order affirmed.

MARIE SUNDIN v. COUNTY FIRE INSURANCE COMPANY OF
PHILADELPHIA AND OTHERS.

COUNTY FIRE INSURANCE COMPANY OF PHILADELPHIA,
APPELLANT.¹

November 7, 1919.

No. 21,397.

Appeal and error — denial of continuance sustained.

1. A trial court has considerable latitude in passing on an application for a continuance. Its action will not be reversed on appeal except for an abuse of discretion. Upon the showing made in this case, there was no abuse of discretion in denying an application for a continuance.

Reformation of insurance policy — wife's name substituted for husband's.

2. In the course of negotiations between plaintiff's husband and the agent of a fire insurance company for a policy covering property owned by plaintiff, the agent was informed that the property belonged to plaintiff and that the title was in her name. The court found that it was mutually intended by the husband and the agent of the insurance company that the wife should be named in the policy as the person assured, and that, through oversight and inadvertence on the part of the company, the husband's name was written in the policy instead of the wife's, without knowledge of the mistake on the part of either the husband or the wife. *Held*: That the trial court was right in holding that there should be a reformation of the policy by substituting in the policy

¹Reported in 174 N. W. 729

the name of the wife for that of her husband as the person insured thereby.

Character of buildings burned.

3. The evidence shows that one of the buildings insured was occupied as a dwelling house and the other as a barn when destroyed by fire.

Wife not estopped by husband's allegation of title.

4. A prior action brought on the policy by plaintiff's husband, in which he asserted ownership of the property, she not being a party to the action and not having authorized her husband to bring it, did not estop her from maintaining an action for the reformation of the policy and a recovery thereon in her own right, the husband's action having been dismissed without a trial prior to the trial of her action.

Action in the district court for Hennepin county to reform a fire insurance policy and to recover on the policy as reformed. The facts are stated in the opinion. The case was tried before Fish, J., who made findings and ordered judgment for \$1,000 against the North River Fire Insurance Company of New York; that the policy of defendant County Insurance Company of Philadelphia be corrected by substituting the name of Marie Sundin in place of O. A. Sundin, and that plaintiff recover \$5,500 from that defendant. The motion of defendant County Insurance Company for amended findings was denied. From the judgment entered pursuant to the order for judgment, defendant County Fire Insurance Company appealed. Affirmed.

George B. Leonard and Maurice Rose, for appellant.

Robert S. Kolliner, for respondent.

LEES, C.

This was an action brought to reform a policy of fire insurance and to recover on the policy as reformed.

Plaintiff is the wife of the defendant, O. A. Sundin. She owned a small farm in Hennepin county, upon which a dwelling house and barn were being erected. Her husband, a tailor in Minneapolis, was approached by one Phelps, an agent of the County Fire Insurance Company (hereafter referred to as the defendant), with the request that he take out insurance on the buildings. It was agreed that a policy of \$5,500 should be written, covering the house, the household goods contained in it and the

barn, divided as follows: \$3,000 on the house, \$1,000 on its contents, and \$1,500 on the barn. The policy was issued and delivered to Sundin, inclosed in a sealed wrapper, and was not examined until after a fire entirely destroyed the property insured. It was then discovered that the policy was written in Sundin's name instead of in the name of his wife. An attempt was made to adjust the loss without success, and finally an action was brought on the policy by Sundin in his own name, he alleging in his complaint that he was the owner of the property. The defendant answered, denying his ownership, and alleged that his wife was the owner. This action was dismissed before the trial of the action brought by Mrs. Sundin.

She sued to have the policy reformed by inserting her name in place of her husband's as the assured, and to recover the full amount of the insurance. The answer pleaded the action brought by her husband, which was then pending, denied her ownership and alleged that defendant believed, when it issued the policy, that her husband was the owner of the property. There were other defenses pleaded, to which reference is unnecessary. The case was tried without a jury, and the court found that plaintiff was entitled to a reformation of the policy as prayed and to a recovery of the full amount of the insurance. At the trial defendant asked for a continuance, on the ground that Phelps was in France in the Red Cross Service, and hence it was unable to procure his testimony. Its request was refused. This appeal is from an order denying a new trial.

The grounds principally relied on for a reversal are the following: (1) That the court erred in denying defendant's application for a continuance. (2) That the proof shows that plaintiff is not entitled to a reformation of the policy. (3) That the house and barn were not occupied. (4) That the action brought by Sundin and his allegation of ownership estopped plaintiff from asserting that she is the owner of the property.

1. A trial court has considerable latitude in passing on an application for a continuance. Its action will not be reversed on appeal except for an abuse of discretion. 1 Dunnell, Minn. Dig. § 1710. The application was not made until the case was called for trial. It followed upon an amendment to the complaint made at the suggestion of the court. The amendment expressly alleged plaintiff's ownership of the property. Defendant asserted that it was taken by surprise, in that it had counted up-

on what it had considered a fatal defect in the complaint in the omission of a direct allegation of this sort, and hence was not prepared to meet it. The application was not supported by an affidavit of any kind, but was based on the statement of defendant's attorney that it would show by Phelps that in the negotiations for the policy plaintiff's husband stated that he owned the property, and that his statement was relied on. The action had been at issue for more than a year before it was tried. The complaint alleged that plaintiff's husband acted as her agent in obtaining the policy; that he declared that she owned the property, and that he and Phelps both intended that the policy should protect plaintiff as such owner. In the action brought by Sundin, defendant alleged that when the policy was taken out Mrs. Sundin was and still is the owner of the property.

In view of these circumstances, it can hardly be said that defendant could not be expected to know that plaintiff would offer proof of her ownership and of the negotiations between her husband and Phelps, and that such proof might be receivable under the complaint as it stood before it was amended. Neither can it be said that it did not have sufficient time in advance of the trial to take Phelps' deposition. There was no abuse of discretion in refusing to grant a continuance.

2. Sundin testified that he told Phelps that the property was in his wife's name and belonged to her, and that a policy of \$1,000 had been issued by another company to her. He also testified that she owned the household goods. The court found the facts to be in accordance with his testimony, and further found that it was mutually intended by Sundin and defendant that Mrs. Sundin should be named in the policy as the person assured, and that, through oversight and inadvertence on the part of defendant, Sundin's name was written in the policy instead of his wife's, without knowledge of the mistake on the part of either the husband or wife. In the apt language of the memorandum filed by the learned trial judge, no evidence was adduced indicating that it was desired that the insurance should not run to Mrs. Sundin, and it ought not to be assumed that either the company or its agent intended to issue a policy that, on its face, would be of no value to either the husband or the wife; hence a mistake occurred in which both the agent of the insurer and the agent of the assured were equally involved.

The facts present a case where reformation of the policy was justified. The right to a reformation of an insurance policy was recently considered by this court and its decisions collected and reviewed in *Mahoney v. Minn. F. & M. Ins. Co. of Minneapolis*, 136 Minn. 34, 161 N. W. 217. We need not go beyond our own decisions in disposing of the question. Cases in which the facts were quite similar to those presented here and in which it was held that a reformation was proper are the following: *Keith v. Globe Ins. Co.* 52 Ill. 518, 4 Am. Rep. 634; *German Fire Ins. Co. v. Gueck*, 130 Ill. 345, 23 N. E. 112, 6 L.R.A. 835; *Cook v. Westchester Fire Ins. Co.* 60 Neb. 127, 82 N. W. 315; *Taylor v. Glens Falls Ins. Co.* 44 Fla. 273, 32 South. 887; *Hill v. Millville, etc. Fire Ins. Co.* 39 N. J. Eq. 66; *Balen v. Hanover Fire Ins. Co.* 67 Mich. 179, 34 N. W. 654.

3. The policy insured the buildings while the one was "occupied as a dwelling house" and the other while "occupied as a barn." The court did not find that either building was so occupied at the time of the fire. It is contended that plaintiff cannot recover in the absence of such a finding. The record shows that the buildings were under construction in 1914 and 1915, and were occupied by plaintiff and her family part of the time and part of the time by a man and his family who had charge of the farm on which they were located. It also shows that the adjuster, in preparing the agreement for a settlement of the loss, described them as a "dwelling house and barn." We think there is no merit in this contention.

4. The action brought by Sundin did not estop plaintiff from asserting ownership of the property, or bar her from maintaining an action for the reformation of the policy and for a recovery thereon in her own right. *Spurr v. Home Ins. Co.* 40 Minn. 424, 42 N. W. 206; *Marcus v. National Council of K. & L. of S.* 127 Minn. 196, 149 N. W. 197. She was not a party to the action brought by her husband. Defendant was not misled as to the facts, for, in its answer in the first case, it expressly alleged that Mrs. Sundin owned the property. This action was never tried and it does not appear that bringing it prejudiced defendant in any way. Neither does it appear that Mrs. Sundin ever authorized her husband to bring it or adopted his acts in that regard as those of her agent. It does appear that while it was pending she made and delivered to defendant a sworn statement, setting forth her ownership of the property, her igno-

rance of the mistake in issuing the policy to her husband, and a demand for its reformation and for payment to her of the full amount of the insurance. We are of the opinion that the defense interposed on this ground cannot be sustained.

No special mention need be made of other matters suggested in the briefs, for, upon the whole record, we are clearly of the opinion that the learned trial court disposed of the case correctly.

Order affirmed.

AAGE F. HANSEN v. NORTHWESTERN FUEL COMPANY.¹

November 7, 1919.

No. 21,433.

Workmen's Compensation Act — accident in course of employment — motion to dismiss common law action.

1. The plaintiff was in the employ of a laundry company. He and the laundry company and the defendant were under the compensation act. While carrying a pack of laundry on his back from a hotel to the laundry, he was injured at the noon hour by an auto truck of the defendant. He should have taken this laundry in the morning when out on his route with his wagon but he forgot it. He brought this action against the defendant on its common law liability. Under the compensation act an employee may bring a common law action against the third party and recover to the extent which he would receive from his employer under the compensation act, and if he proceeds against his employer under the compensation act his employer is subrogated to his cause of action against the third party to the extent the employer has paid under the compensation act. At the close of the testimony the defendant moved that the case be dismissed as a common law action and that the court award or deny compensation in accordance with the compensation act, and the court, being of the opinion that as a matter of law the injury to the plaintiff arose out of and in the course of his employment, granted the motion.

Same.

2. The injury to the plaintiff came from a street risk and as a matter of law arose out of his employment.

¹Reported in 174 N. W. 726.

Same.

3. The injury to the plaintiff as a matter of law arose in the course of his employment.

Effect of granting defendant's motion.

4. By the granting of the motion of the defendant to dismiss the case as a common law action and to proceed as under the compensation act the defendant's liability to respond to the extent to which the laundry company was liable was determined, and there remained nothing to do except to fix compensation.

Action in the district court for Ramsey county to recover \$5,000 for personal injuries. The case was tried before Hanft, J., who at the close of the testimony granted the motion of defendant to dismiss the case as a common law action and that the court either grant or deny compensation under the Workmen's Compensation Act. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

Douglas, Kennedy & Kennedy, for appellant.

John R. Ware, for respondent.

DIBELL, J.

Action to recover damages for personal injuries. The case was dismissed, as a common law action, and retained for an award of compensation according to the terms of the compensation act. The plaintiff appeals from an order denying his motion for a new trial.

1. The plaintiff was in the employ of the Standard Laundry Company in St. Paul. He was run over by a truck of the defendant company. All three, the plaintiff, the defendant and the laundry company, were under the compensation act.

The plaintiff brought this action to recover on the defendant's common law liability. The answer alleged that all three were under the compensation act, and the fact was so.

The evidence established a prima facie case of common law liability. The court was of the opinion that the plaintiff, as a matter of law, was within the compensation act, and that plaintiff's injury arose out of and in the course of his employment, within G. S. 1913, § 8195, and upon the motion of the defendant dismissed the action as a common law action and

retained it for an award of the compensation fixed by the Workmen's Compensation Act.

The plaintiff was a laundry driver. He had a down town route. He used a horse and wagon, gathering laundry from the different hotels in the morning and returning it in the evening. He usually commenced work about six, stabled his horse at noon in a barn near the laundry, and commenced work again at 1:30 in the afternoon. On the day of his injury he worked in the forenoon and stabled his horse at the usual time. After lunch he was about town when he remembered that he had not collected laundry from the Brinsmead hotel as he should have done. It should have been taken at 11 and should have been at the laundry at 12. It was to be returned at five. He immediately went to the hotel, which was but a short distance away, took the bag of laundry on his back, and started for the laundry some six blocks distant. On the way he was injured by the auto truck.

2. The court was right in holding, as a matter of law, that the injury to the plaintiff arose out of his employment. It was a street risk to which his work subjected him. This should be understood to be settled law in this state as it is generally in other states. *Mahowald v. Thompson-Starrett Co.* 134 Minn. 113, 158 N. W. 913, 159 N. W. 565, and cases cited; *Kunze v. Detroit Shade Tree Co.* 192 Mich. 435, 158 N. W. 851, L.R.A. 1917A, 252; *Burton Auto Transfer Co. v. Industrial Accident Com.* (Cal. App.) 174 Pac. 72; *Keaney's Case*, 232 Mass. 532, 122 N. E. 739; *Globe Ind. Co. v. Industrial Acc. Com.* 36 Cal. App. 280, 171 Pac. 1088; *Consumers' Co. v. Ceislik* (Ind. App.) 121 N. E. 832; *Bachman v. Waterman* (Ind. App.) 121 N. E. 8. It is now the definitely settled law in England. *Dennis v. A. J. White & Co.* [1917] A. C. 479; *Arkell v. Gudgeon*, 118 L. T. R. 258.

3. The injury arose in the course of the employment of the plaintiff. It is true that he was not using his delivery wagon and that it was not customary to carry laundry as he was doing at the time, but he was working in furtherance of his employer's interest. The laundry was received by the laundry company after the accident and laundered. He did not step aside from his work for some purpose of his own but was actually furthering the business of the company. It had never told him to do or not to do as he did. Such an occasion had not arisen. It is clear that if

an injury had not intervened there would have been no thought of criticism. It would be too severe a rule that would permit a finding, if the proceeding were against the laundry company under the compensation act, that the plaintiff was not in the course of his employment. The result here should be the same. The holding that, as a matter of law, the injury arose out of the employment was right. The cases on principle, and some with somewhat resembling facts, support the rule. *Mahowald v. Thompson-Starrett Co.* 134 Minn. 113, 158 N. W. 913; *State v. District Court of Hennepin County*, 141 Minn. 61, 169 N. W. 274; *State v. District Court*, 143 Minn. 144, 172 N. W. 897; *Grieb v. Hammerle*, 222 N. Y. 382, 118 N. E. 805; *Mueller Const. Co. v. Industrial Board*, 283 Ill. 148, 118 N. E. 1028, L.R.A. 1918F, 891, Ann. Cas. 1918E, 868; *Kunze v. Detroit Shade Tree Co.* 192 Mich. 435, 158 N. W. 851, L.R.A. 1917A, 252; *Robinson v. State (Conn.)* 104 Atl. 491; *Frint Motor Car Co. v. Industrial Com.* 168 Wis. 436, 170 N. W. 285; *Dennis v. A. J. White & Co.* [1917] A. C. 479; *Arkell v. Gudgeon* [1917] A. C. 479, 118 L. T. R. 258.

4. The compensation act provides that the person injured may proceed under the compensation act against his employer, or against a third party by a common law action for negligence. To recover against the third party he must prove his common law cause of action. If he recovers in a common law action he can have no greater amount than that fixed by the compensation act. If he takes under the compensation act his employer is subrogated to his common law action against the third party and his recovery is limited to the amount payable under the compensation act. G. S. 1913, § 8229. The statute gives no right to proceed against the third party under the compensation act.

At the close of all the testimony the defendant moved that the case be dismissed as a common law action and that the court either grant or deny compensation under the Workmen's Compensation Act. The motion was granted. The defendant invited an award of compensation. It cannot contest the question of its liability to the extent to which the laundry company was liable. There is nothing now to do but fix compensation. See *Mahowald v. Thompson-Starrett Co.* 134 Minn. 113, 158 N. W. 913, 159 N. W. 565.

The order is affirmed and the case remanded with directions to the court to entertain such further proceedings as may be appropriate.

Order affirmed.

HENRY J. GUDE v. CITY OF DULUTH.¹

November 7, 1919.

No. 21,437.

Municipal corporation — wrongful exclusion from office — liability for salary.

Within the rule stated and applied in *Markus v. City of Duluth*, 138 Minn. 225, it is *held* that the evidence justified the jury in finding that plaintiff was wrongfully excluded from his employment, which was protected by the municipal civil service regulations, and that he did not acquiesce in such exclusion or abandon the position held by him.

Action in the district court for St. Louis county to recover \$2,300 for salary. The answer alleged that if plaintiff was at any time employed as a regularly qualified inspector by the department of public works he had abandoned all claim to the office and to the salary attached thereto. The case was tried before Dancer, J., who when plaintiff rested and at the close of the trial denied defendant's motions to dismiss the action, and at the close of the testimony motions of the respective parties for a directed verdict, and a jury which returned a verdict for \$1,713.07. Defendant's motion for judgment notwithstanding the verdict was denied, and its motion for a new trial was granted unless plaintiff consented to a reduction of the verdict to \$1,200, and if consent were given the motion was denied. The consent was given. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

John E. Samuelson, Leonard McHugh and M. T. O'Donnell, for appellant.

W. H. Gurnee, for respondent.

BROWN, C. J.

For a number of years plaintiff was in the employ of the city of Duluth

¹Reported in 174 N. W. 614.

as an inspector in its department of public works. He was in the classified service and entitled to the benefits and protection of the civil service regulations provided for by the city charter, under which he could be removed from the employment for cause only. Provision was made by such regulations for "laying off" employees whenever there was no work in the particular department to do, which was applicable to the position held by plaintiff. But an employee so laid off is entitled to precedence in reinstatement according to his seniority in the service. Plaintiff was laid off in October, 1916, but was never reinstated, being excluded from the position by the employment of others to do the work, who as to plaintiff were junior in rank in the service. He made repeated demands for reinstatement, but was refused, and in October, 1918, brought this action to recover the salary attached to the position during the period of his exclusion. He had a verdict in the court below and defendant appealed from an order denying its motion for judgment or a new trial.

The questions presented do not require discussion. The case in its controlling facts cannot be distinguished from *Markus v. City of Duluth*, 138 Minn. 225, 164 N. W. 906, and like cases therein cited. Under the civil service rules plaintiff was entitled to preference in the matter of reinstatement and this was denied him; in fact restoration to the service, preferential or otherwise, was in effect refused, though no proceedings for his removal under the civil service regulations were commenced against him. His exclusion from the service was therefore wrongful and unlawful, a violation of the letter as well as the spirit of the civil service law, and, within the rule applied in the *Markus* case, entitled him to compensation during the period of exclusion. Whether he acquiesced in the action of the head of the department in so excluding him from the service, and whether he abandoned the position held by him, were questions of fact for the jury, and the verdict in his favor thereon is not opposed to the weight of the evidence. The proper method of removing plaintiff from the employment was by direct proceedings under the civil service regulations, and not by indirection and without charges as here attempted.

This covers the case and all that need be said in disposing of the points made. We discover no error in the record, the evidence supports the verdict, and the order denying a new trial must be and is affirmed.

IN THE MATTER OF THE ESTATE OF HALVOR KNUTSON,
DECEASED.

GENA BENRUD AND OTHERS v. OLE O. ANDERSON AND
OTHERS.¹

November 7, 1919.

No. 21,455.

Will — attesting witness, though a legatee, may prove execution.

1. Since section 7254, G. S. 1913, annuls the interest of a devisee or legatee in a will where he is an attesting witness thereto and there is but one other attesting witness, such devisee or legatee is a competent witness to prove the will.

Declarations or admissions of legatees inadmissible, when.

2. Where there are several legatees in a will, declarations or admissions by one of them, tending to cast doubt on the instrument presented for probate are not admissible, where such legatee has not taken the stand to sustain the will, and such declarations are not part of the *res gestae* of its execution.

Cross-examination of legatees for impeachment not permitted.

3. The contestants may not call the legatee, who has made such admissions, for cross-examination under the statute to lay the foundation for impeachment, and thus indirectly introduce that which is inadmissible directly.

When will is written in English and testator has given instructions in another language.

4. Where a will has been drawn in the English language, but all the directions as to its preparation have been given by the testator in another tongue, it may nevertheless be found to be his last will and testament, if, prior to its execution, a substantially accurate translation or explanation of its provisions is given the testator, so that he understands their meaning. It is not necessary that he should correctly appreciate their legal effect.

Testator's knowledge of will, even if it fails in part to fulfil his intention.

5. If a testator comprehends and approves the instrument as written, it should not be refused probate because it fails to carry out the intention of the testator as to part of his property.

¹Reported in 174 N. W. 617.

From an order of the probate court for Goodhue county, Ericson, J., refusing to admit to probate what purported to be the last will and testament of Halvor Knutson, deceased, Gena Benrud, Hans Knutson and Mrs. Edward Olson, three of the beneficiaries under the instrument, appealed to the district court for that county. The appeal was heard by Converse, J., who affirmed the order of the probate court and ordered that the appeal be dismissed. Appellants' motion to vacate the order of affirmation and for findings of fact and conclusion of law was granted, findings of fact were made, and the judgment of the probate court affirmed. The appellants then moved for certain amendments to the findings of fact and conclusion of law, or for a new trial. From an order denying this motion, they appealed. Reversed.

Albert Schaller and Mohn & Mohn, for appellants.

P. B. Green and O. J. Ostensoe, for respondents.

HOLT, J.

Halvor Knutson died late in the afternoon of June 25, 1917, a resident of Goodhue county, this state. He was a widower about 84 years of age. He left no blood relatives other than nieces and nephews. Five stepchildren survived. Four of these were the children of his first wife by his deceased brother. The other stepchild, Marne, generally known as Mary Olson, was the daughter of his last wife by her first husband. At the time of his death, Halvor Knutson owned a valuable farm of 200 acres in Goodhue county, some timber land in Wisconsin, and over \$6,000 in bank certificates and personal property. For some time before his death, he had made his home with his niece and stepchild Gena Benrud. His stepson Nels Knutson frequently visited him there. It appears that toward the middle of June the deceased became painfully afflicted with a swelling of the feet and legs, and he realized that death was approaching. The swelling developed into gangrene, and during the last four days of his life he was mostly in a comatose condition, incapable of transacting any business.

In the forenoon of June 25, Kenneth G. Benrud, son of Gena Benrud, came to the office of the judge of probate and left an instrument purporting to be the last will and testament of Halvor Knutson. Kenneth had drawn and witnessed the will. The other attesting witness was Nels Knutson. When afterwards presented for probate it was rejected, on the

ground that the instrument was not the last will and testament of the deceased. On appeal to the district court, that court simply affirmed the probate court, making no other findings, but stating in a memorandum that the decision was based solely upon the ground that Nels Knutson, being named as legatee in the will, was incompetent to testify. Hence, as the court undoubtedly concluded, there was no legal proof of the execution of the instrument after eliminating the testimony of Nels Knutson. The court also stated that the other objections to the probate of the instrument were not supported by the evidence. Thereafter the appellants moved the court to strike out the decision made and for findings upon all the issues litigated, and also proposed findings admitting the will to probate. The court vacated the prior decision and filed findings, but not the ones proposed. Thereupon appellants moved for amended findings or a new trial. From the order denying the motion in toto this appeal is taken.

The instrument, Exhibit A, reads:

"June 15, 1917.

"In the name of the Lord, I, Halvor Knutson, of the Town of Goodhue, County of Goodhue and State of Minnesota; will all my personal and mixed property to my stepchildren as follows:

"First. Mrs. Edward Olson, \$2,000. Second, Mr. Knut Knutson, \$1,000. Third. The remaining property equally divided among the following Mr. Nels Knutson, Hans Knutson and Mrs. Gena Benrud.

"(Signed)

Halvor Knutson,

"Nels Knutson.

Per K. G. Benrud.

"Kenneth G. Benrud."

The district court found that deceased was competent to make a will until about June 17, 1917, and on the twenty-first or twenty-second he became wholly irrational; that, between the sixteenth and twenty-second, he was probably at times competent; that there was no evidence of undue influence; that either on the fifteenth or twenty-fifth of June the instrument offered for probate was wholly written by Kenneth G. Benrud, "except the signature 'Nels Knutson', the decedent never read it and did not sign it or make his mark to it, and the words used in it are not his words. The evidence as to whether or not he directed Kenneth G. Benrud to prepare a will for him; as to what, if anything, he directed should be put

in said purported will; as to whether the purported will was read over to him at any time or correctly explained to him; as to whether the decedent directed Kenneth G. Benrud to sign his name to it; as to whether said purported will was executed prior to June 17th, if at all, is all so unsatisfactory and contradictory and is impeached by circumstances and by the appearance of the Exhibit 'A' itself, that I feel impelled to, and do find as facts:

"(a) That the provisions contained in Exhibit 'A' are not the directions of the decedent as to what should be incorporated in his last will.

"(b) That said Exhibit 'A' does not contain either the words or the language of the decedent.

"(c) That after Exhibit 'A' was written, it was neither read over to him nor correctly explained nor interpreted to him.

"(d) That said decedent never directed any one to sign his name to Exhibit 'A'.

"9. That said purported will Exhibit 'A' is not the will of the decedent Halvor Knutson."

The findings leave a fact of utmost importance in this case at large, namely, the date on which the instrument was attempted to be executed. The court finds in the alternative, that it was either on the fifteenth, or on the twenty-fifth of June. If it took place on the twenty-fifth, there can be no doubt upon this record that the instrument proffered is not the will of the deceased, for at that time he was practically dead to this world, and any attempt to propose for probate an instrument executed on that day by him would be but a bold attempt to pass a forgery. But if the instrument was drawn and signed on the fifteenth, and the findings leave that equally probable, then the evidence properly in the case, eliminating that which should not have been received, would seem clearly, if satisfactory to the trial court, to call for its probate as the last will and testament of Halvor Knutson.

The two attesting witnesses, Nels Knutson and Kenneth G. Benrud, were the only persons who had personal knowledge of the circumstances surrounding the drawing and execution of the will. The latter did not testify in the district court, being at the time in our army at France; but, by consent of the parties, the probate judge read on the trial in the district court the notes he had taken of Kenneth's testimony on the hear-

ing in the probate court. This necessarily precluded explanations made desirable because of new matters advanced or developed on the trial in the district court that were not even suggested in the probate court. From the memorandum filed by the district judge when he first decided the appeal, it is clear that Nels Knutson's testimony, though received at the trial, was wholly excluded from consideration, because, on reflection, he came to the conclusion that the rule stated in *Bowler v. Fahey*, 136 Minn. 408, 162 N. W. 515, forbade its admission. It is suggested by respondents that the subsequent findings render the ruling now a moot question. We are unable to accept that view. In order that proponents might be in a better position to secure their rights, if perchance his conclusions were wrong, the court took pains to make clear that the first decision resulted because of the rejection of Nels Knutson's evidence. There is nothing in the subsequent findings to show that the court changed his views upon the admissibility of that testimony, or that it was considered at all in making any finding of fact. The elimination of Nels Knutson's testimony, of course, affected proponents' case disastrously.

We think the learned trial court labored under a misconception of the scope of the rule applied in *Bowler v. Fahey*, supra. It was there held that under section 8378, G. S. 1913, one who voluntarily takes up and persists in a will contest, though he would receive the same amount whether the will was sustained or rejected, asserts such an interest in the issue as to preclude him from testifying to conversations with the testator. The witness there referred to was not one of the attesting witnesses to the will. Section 7254, G. S. 1913, impliedly takes from out of said section 8378 an attesting witness to a will, who is a devisee and heir, by providing that the devise to such witness shall be void, but in the decree of distribution the court shall assign to such witness the share that would have descended to him had there been no will, not exceeding, however, in value the amount of the devise or the bequest. By this statute the interest of an attesting witness, who is both devisee and heir, is destroyed, thus enabling him to testify to the execution of the will and the mental condition of the testator. *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113. Aside from this, it was held in *Vester v. Collins*, 101 N. C. 114, 7 S. E. 687, that an attesting witness to a will does not come within the prohibition of a statute like said section 8378, even though he be a devisee or a party

to the contest, he is said to be a witness of the law and not of the party. Nels Knutson was a competent witness, and his testimony should be considered in determining the issues of this will contest.

We also think the assignment of error well taken upon the reception of the testimony of Miss Justman, to the effect that Gena Benrud stated to her that they had tried to get Halvor Knutson to make a will, but that he had absolutely refused. Miss Justman was the nurse who attended the deceased during the last four days of his life. The statement testified to was made during her stay. It is readily seen that this evidence, if admissible, tended strongly to prove that no will was in existence prior to the twenty-first of June.

The contestants were permitted to lay a foundation for the introduction of Miss Justman's testimony by calling Mrs. Benrud for cross-examination and eliciting from her that she knew that the will had been executed before the nurse came, and then asked her whether or not she had made the statement above referred to to Miss Justman. Respondents concede that declarations or statements of Mrs. Benrud could not be received as an admission against interest, because there were other parties interested in the probate of the will. The authorities so hold. In *McAllister v. Rowland*, 124 Minn. 27, 144 N. W. 412, Ann. Cas. 1915B, 1006, it is said: "It is elementary that the declarations of one of two or more legatees or devisees are not admissible as against the others." See also *James v. Fairall*, 154 Iowa, 253, 134 N. W. 608, 38 L.R.A. (N.S.) 731. But its admissibility is sought to be defended as impeaching testimony and also as *res gestae*.

The contention is unsound.

The proponents did not call Mrs. Benrud; she was called by contestants for cross-examination, merely for the purpose of laying a foundation for the introduction of Miss Justman's evidence as to the alleged statement. This was attempting to do by an indirection that which may not be done directly. *Mason v. Poulson*, 40 Md. 355; *Stirling v. Stirling*, 61 Md. 138, 21 Atl. 273, and section 372, *Alexander, Com. on Law of Wills*, cited by respondents, are not in point, because Mrs. Benrud did not take the witness stand in behalf of proponents. Nor in the cross-examination under the statute did she undertake to testify as of her knowledge to any fact pertinent to the issues on trial. Nor can we see any pos-

sible connection between the statement attributed to her and the issue of the execution of the will so as to make the statement a part of the *res gestae*. The Iowa case, above cited and relied on by respondents, is not in their favor, but quite the contrary. In the case at bar there was no evidence of undue influence by Mrs. Benrud or any one else, and not the slightest suggestion that she brought about the making of the will. That the unwarranted calling of Mrs. Benrud for cross-examination for the sole purpose of laying a foundation for the impeachment permitted from Miss Justman, was highly prejudicial, is clear.

The rulings above noted as erroneous call for a new trial, and in that situation it is improper to discuss the evidence or the conclusions to be drawn therefrom, except insofar as it is evident from the record that improper considerations influenced the deductions made and which may likely again affect the results of another trial.

From the findings it may be inferred that the learned trial judge was of the opinion that, unless the will was read over to testator in the language in which it was written, it could not become his will. It appears that the talk between the scrivener and the testator was entirely in the Norwegian language, and that the latter's directions with respect to the terms of the will and the execution thereof were all in that language. One of the attesting witnesses uses the expression that, after preparation of the instrument and before its execution, it was explained to the deceased, and the other says it was read over. The natural inference is that the reading and explanation were in the Norwegian language, hence a translation rather than a repeating of the very sounds or words in which the will is written. We think if there was a substantially accurate translation or explanation of the instrument, so that testator understood it to dispose of his property as he intended, there should be no hesitancy in holding it to be his will, even though he did not hear it read in the language in which it is written, and even though there was not a literal translation thereof. Some consideration must be given to the manner in which persons in the situation here shown would be expected to transact business of this nature. It is not indispensable to the validity of a will that it should be couched either in the words of the testator or in the tongue in which he gives the directions to the one who drafts the instrument.

One finding is that the provisions contained in the instrument are not the directions of the decedent as to what should be incorporated in the will. This impliedly assumes that he did give directions, as the attesting witnesses assert, but concludes that the directions given were not followed by the scrivener. To this conclusion the court must have been moved by the argument of counsel for contestants that Halvor Knutson directed the will to be so drawn that it would dispose of all his property, but that as drawn it does not dispose of his real estate.

If the deceased, after the instrument as drawn had been explained or translated to him with substantial accuracy, thought that it disposed of all his property, it should be admitted as his last will and testament, even though it failed to dispose of part thereof. It frequently happens that courts construe the dispositions in a will, even when drawn by experienced lawyers, contrary to what the testator thought he had made. Because a will may or even must be construed as to some provision differently from what a testator intended, is no reason why it should be refused probate. If the will was in fact drawn at the direction of the deceased on June 15, and then executed, there is no suggestion in the record that there was any assurance given him that it did dispose of his property in accordance with his expressed desires, or that there was any intention to mislead him as to the provisions of the will, or to fraudulently insert anything other than what he intended should be there, or that it was not correctly translated or explained. Indeed, the testimony indicates a reluctance on the part of Kenneth to prepare the document. The important consideration is, did deceased know the contents of the instrument.

Counsel cite *Waite v. Frisbie*, 45 Minn. 361, 47 N. W. 1069. The facts there were not like those in the present case. The testatrix was at the point of death, too weak to speak. A will was prepared in which were several bequests, and then her husband was made the residuary legatee. When the instrument was read over to testatrix, she would not sign it, unless changed so as to make it obligatory on her husband to support her brother, if he should come to want. A lawyer was called in to draft and insert such a clause. The dying woman was assured that the clause inserted accomplished what she desired. It was not read or explained to her. In legal effect the clause added nothing to the instrument. The

facts recited seem not to have been disputed. The instrument was held not to be her will, Chief Justice Gilfillan saying: "If it were clear that the words in which the sixth clause is expressed were her words—that they were chosen by her or adopted by her—the instrument would be none the less her will, although the words did not effect the purpose she may have intended."

On the subject under consideration a headnote by the justice who wrote the opinion in *Re Gluckman*, 87 N. J. Eq. 638, 101 Atl. 295, L.R.A. 1918D, 742, expresses the law thus: "Physical or educational disability, however, as blindness or inability to read the language, if accompanied by circumstances leading the court to suspect possible imposition, subjects proponents of a will to the additional burden of showing to the satisfaction of the court that testator knew its contents so that he understood them." An extensive note accompanies this case, under the topic "necessity of knowledge by testator of contents of his will and proof thereof," with full citation of authorities, as found in L.R.A. 1918D, 742.

Whether the will does or does not dispose of the real estate is not properly before us now, there is no finding that he directed Kenneth to specifically mention his real estate.

For the errors pointed out a new trial should be had. Order reversed.

L. J. MUELLER FURNACE COMPANY v. O. P. BAHNEMAN AND
OTHERS.¹

FLOUR CITY FUEL & TRANSFER COMPANY, APPELLANT.

November 7, 1919.

No. 21,467.

Mechanic's lien statement — execution by agent.

1. Where, in executing a lien statement, an authorized agent of the claimant signs his name immediately below the verification and above the jurat, the signing constitutes a sufficient subscription thereto.

¹Reported in 174 N. W. 614.

Knowledge of owner — finding sustained by evidence.

2. Testimony considered and *held* sufficient, coupled with the presumption flowing from the undisputed facts, to sustain a finding, that the improvement to real property was made with the knowledge and consent of the owner in fee of the premises.

Action in the district court for Hennepin county to foreclose a mechanic's lien. The case was tried before Converse, J., of the First judicial district, who made findings, ordered judgment in favor of plaintiff for \$65.36 and that the amount be a specific lien upon the premises, and a sale of the premises to satisfy plaintiff's lien and judgment. From the judgment entered pursuant to the order for judgment, defendant Flour City Fuel & Transfer Company appealed. Affirmed.

Brady, Robertson & Bonner, for appellant.

A. M. Breeding and Walter S. Whiton, for respondent.

QUINN, J.

Action to enforce a lien for the value of certain material furnished by the plaintiff for use in the repair of a steam heating plant.

It appears from the findings in this case that in November, 1916, the plaintiff furnished, at the special instance and request of the defendant Bahneman, and with the knowledge and consent of the defendant Flour City Fuel & Transfer Company, one cast iron steam dome and a cast iron fire pot for use in the repair of a Mueller steam boiler then in a building on the premises in question, of which the defendant last named was and still is the owner in fee. The articles were so used and were of the value of \$65.36. Within 90 days after the furnishing of said material, plaintiff caused a lien statement to be prepared and filed for record in the office of the register of deeds of the county in accordance with the provisions of section 7026 of the statute.

The court also found as conclusions of law: (1) That plaintiff was entitled to a personal judgment against the defendant Bahneman for the sum of \$65.36, with interest thereon at the rate of six per cent per annum from the fifteenth day of November, 1916, and for \$3.65 disbursements, and \$25 attorney's fee; (2) that the plaintiff is entitled to judgment decreeing said amount a specific lien upon the premises described in the

complaint, subject, however, to the mortgages thereon, and to a foreclosure of said lien as provided by law, and ordered judgment accordingly. Judgment was so entered and the defendant Flour City Fuel & Transfer Company appealed.

It is contended by appellant that the failure of the person who verified the lien statement to sign his name on the line provided for that purpose immediately above the verification is fatal to the validity of the lien. The question was disposed of adversely to appellant's contention in *Norton v. Hauge*, 47 Minn. 405, 50 N. W. 368. The lien statement was in the usual form. The verification after the venue reads: "Harry H. Miller, of said county, being duly sworn, says he is the manager," etc. Miller signed his name immediately below the verification and above the jurat, which was as follows: "Subscribed and sworn to before me this 1st day of February, 1917. Claude M. Stanley, Notary Public," etc. The execution of the lien statement was sufficient.

The testimony upon several material matters is quite meager, but, coupled with the presumptions flowing from the undisputed facts, is sufficient, in our opinion, to sustain the findings of the trial court. It conclusively appears that at all the times in question the defendant fuel and transfer company was the owner in fee of the premises in question, but it does not appear who occupied the premises at the time the improvement was made. It is well settled in this state that improvements upon real estate, such as the one here in question, are presumed to be made upon authority from the legal owner of the premises. *G. S. 1913, § 7024*; *Rockey v. Joslyn*, 134 Minn. 468, 158 N. W. 787; *Stravs v. Steckbauer*, 136 Minn. 69, 161 N. W. 259. The material in question was sold to Bahneman for use in the repair of the boiler which plaintiff had formerly furnished. It was delivered on the premises in question. True Mr. Ekstrum, president of the defendant company, testified upon the trial to the effect that he never made a contract with Bahneman for the improvement in question; that he never knew of the furnishing of the fire pot and dome for the heating plant on said premises, and never learned of the same until about a week before the trial, or when the papers were served. This testimony is not, of itself, such as to necessarily overcome the findings of the trial court that the material was furnished

and the improvement made with the knowledge and consent of the owner of the property.

The witness Miller testified, in effect, that he was the manager of the plaintiff and that he sold the material in question to Bahneman, that the parts were sent out to and installed on the premises in question. He further testified that "in this particular boiler there are two water and steam chambers, which are the fire pot and the dome. We had originally furnished a boiler, and on this invoice we furnished another fire pot and dome which was put in, replacing the ones that originally came with the boiler. They were put in to complete a steam plant." On cross-examination:

"Q. Did you see it before the old parts were taken out?

"A. No, when I was out there the old pot and steam dome were laying there on the floor; the new ones were installed.

"Q. This was to repair the original plant, replace parts of the original plant which were taken out?

"A. Yes."

Appellant is a corporation. It does not appear what officer or person had to do with looking after the premises, nor whether such person had any actual knowledge of the improvement at the time the same was being made. The case may be said to come well within the rule in *Emery v. Hertig*, 60 Minn. 54, 58, 61 N. W. 830.

The judgment appealed from is affirmed.

O. H. HOWE v. L. M. GRAY AND ANOTHER.¹

November 7, 1919.

No. 21,477.

Action by vendor for breach of contract — findings sustained by evidence.

1. In an action for the breach of an executory contract for the sale of land, brought by the vendor against the vendee, the evidence is *held* to support the findings of the trial court to the effect that plaintiff suffered no loss or damage by the refusal of defendants to perform the contract.

¹Reported in 174 N. W. 612.

Same — measure of damages — interest and taxes paid by vendor.

2. The general rule of damages in such an action is the difference between the value of the land and the contract price. A claim for interest on the purchase price, and for taxes paid by the vendor, are special in character and should, if recoverable at all, be specially pleaded.

General finding covers claims for damages.

3. The particular claims are however presumptively included in the general finding that plaintiff suffered no damage by defendants' failure to perform.

Action in the district court for Hennepin county to recover \$3,000 for the breach of an executory contract for the sale of land. The case was tried before Fish, J., who made findings and ordered judgment in favor of defendants for costs and disbursements. From an order denying his motion for amended findings and conclusions or for a new trial, plaintiff appealed. Affirmed.

Harold W. Cox and Robert M. Works, for appellant.

Jesse Van Valkenburg, for respondents.

BROWN, C. J.

The facts in this case, as disclosed by the findings of the trial court, are substantially as follows: On November 12, 1916, plaintiff and defendants entered into an executory agreement, by which plaintiff sold and agreed to convey to defendants certain real property situated in the village of Frederick, South Dakota, together with the flour mill situated thereon, with contents and equipment, for which defendants agreed to pay the sum of \$5,500; \$500 by the assignment of certain shares of stock in the Power Development Company, a corporation, the balance to be paid on June 12, 1917, for which defendants gave to plaintiff their promissory note bearing six per cent interest payable on that date. As security for the performance of the contract defendants delivered to plaintiff other stock in said power development corporation to the par value of \$25,000. Defendants failed to perform the contract on their part, by the payment of the purchase price when due and in other respects, and thereafter plaintiff sold and conveyed the property to third persons. Plaintiff subsequently brought this action to recover damages alleged to have resulted from defendants' failure and refusal to perform.

The trial court found, in harmony with the defense interposed by defendants, "that no damages were sustained by plaintiff under the proofs submitted by reason of any failure or default alleged against the defendants," and ordered that plaintiff take nothing by the action, and that defendants have judgment for their costs and disbursements. Plaintiff moved for amended findings or for a new trial. The motion was denied and plaintiff appealed.

The principal question in the case is whether the findings of the trial court to the effect that plaintiff suffered no damage by the default and refusal of defendants to perform the contract are sustained by the evidence. A consideration of the record leads to the conclusion that they are sustained. Plaintiff in his complaint claimed general damages only; no special damages were pleaded, and he was entitled to recover, if at all, the difference between the contract price and the market value of the property, including any expense necessarily incurred by the vendor in his effort to carry out the contract. *Wilson v. Hoy*, 120 Minn. 451, 139 N. W. 817. In our view of the evidence the trial court was not required to find therefrom that the market value of the property was less than the contract price, and the finding in effect to the contrary is sustained by the record.

The contention that plaintiff was entitled as damages to interest on the promissory note given for the purchase price of the property, up to the time of defendants' refusal to perform, and to taxes paid by him which defendants by the contract agreed to pay, is not sustained. Both those items, if by defendants' default there was in fact a loss and damage in that respect, were in their nature special and not having been specially pleaded were not recoverable. *Gray v. Bullard*, 22 Minn. 278. Plaintiff's right to recover the items was not litigated by consent, and the trial court refused an amendment to the complaint which would have included them in the damages claimed. There was evidence as to the payment of taxes, received over defendants' objection, and, if the court considered that and the item of interest in finally disposing of the case, they were necessarily covered by and included in the general finding that plaintiff suffered no loss. Plaintiff had received as part payment the power development stock which, in the absence of other evidence bearing on the question, presumptively was of the value of \$500 (*Hawkins v. Millis*,

Pirie & Co. 127 Minn. 393, 149 N. W. 663, Ann. Cas. 1913C, 640), and the evidence would have justified an affirmative finding that the market value of the property exceeded the contract price to an amount in excess of both these particular items of alleged damages. The stock put up as collateral is not a factor in the case, as bearing on the question of damages or otherwise.

Even though plaintiff on the record was entitled to nominal damages, the case in this respect comes within the rule *de minimis*, and a reversal will not be ordered for the refusal of the court below to award the same to plaintiff. 1 Dunnell Minn. Dig. § 417.

Order affirmed.

JAMES E. CARLSON, INC. v. JOHN BABLER.¹

November 14, 1919.

No. 21,381.

Broker negotiating for both sides — finding sustained.

1. A broker may represent both parties to a transaction, if the parties have knowledge of the fact and assent thereto, and then he may recover compensation from both parties if they so agree. The evidence is sufficient to sustain a finding that defendant agreed to pay plaintiff, a broker, one-half of a commission for negotiating an exchange of real property.

Amendment of complaint.

2. The original complaint was on a quantum meruit. There was no error in permitting plaintiff to amend his complaint so as to allege an agreed contract to pay. In fact proof of the agreed contract was admissible under the original complaint.

Amended complaint — admission of payment.

3. The complaint as amended did not contain an admission of payment of the claim sued on.

Charge to jury.

4. The court in charging the jury understated plaintiff's claim as to the terms of the contract. Defendant cannot complain of this.

¹Reported in 174 N. W. 824.

Duty of broker negotiating for both sides.

5. While the negotiations for exchange were pending, plaintiff entered into negotiations with the other party to the exchange, to take over the property which he was to acquire. Plaintiff's evidence is not explicit as to whether defendant was advised of this. No defense predicated on bad faith of plaintiff was pleaded. Plaintiff was not a mere middleman. He negotiated for both sides. A broker negotiating for both sides owes to each the same good faith that he would have owed to either had he acted for him alone. Private negotiations with one party will defeat the broker's right to compensation from the other if the facts are concealed. But, where no such defense is pleaded or litigated, the court will not set aside a verdict for the broker on this ground, unless it is clear as a matter of law that the broker was guilty of bad faith. On the evidence in this case, the court cannot so hold.

Broker — misrepresentation — reversal not warranted.

6. On the record before us we are not justified in setting aside the verdict, on the alleged ground that plaintiff made misrepresentation to defendant. No such defense was pleaded and the evidence of misrepresentation is unsatisfactory.

Evidence — letters admissible to fix date.

7. Certain letters on immaterial subjects were properly admitted for the sole purpose of fixing a date.

Action in the district court for Hennepin county to recover \$2,400, broker's commission in exchange of properties. The case was tried before Converse, J., who at the close of the testimony denied defendant's motion for a directed verdict and granted plaintiff's motion to amend the complaint setting forth an express contract, and a jury which returned a verdict for \$510.40. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

John Ott, for appellant.

Selover, Schultz & Selover and *J. A. Mansfield*, for respondent.

HALLAM, J.

This action was brought to recover a broker's commission in negotiating an exchange of real estate. Defendant owned some flat buildings in Minneapolis. Louis Mortenson owned a 960 acre farm in North Da-

kota. They made an exchange. Plaintiff was instrumental in bringing the parties together. Plaintiff contended that he represented both parties, and that each promised to pay him one-half of a commission of \$960. Defendant denied that plaintiff represented him, and contended that it was expressly stipulated that he was to pay no commission. The jury found for plaintiff. Defendant appeals.

1. Defendant contends that the verdict is not sustained by the evidence. We think the evidence is sufficient. A broker may represent both parties, if his conduct is open and above board, and both parties have knowledge that he so acts and consent thereto, and he may under such circumstances recover compensation from both parties if they so agree. *Wasser v. Western Land Securities Co.* 97 Minn. 460, 107 N. W. 160. This is precisely the situation testified to by plaintiff in this case. True, plaintiff's case rests chiefly on his own testimony. It is sharply contradicted. It contains some inconsistencies. He admitted that defendant at first protested against paying any commission. But he did distinctly testify that defendant finally agreed to pay the amount claimed. Plaintiff undoubtedly brought the parties together. Without him the exchange would never have been made. The question whether defendant agreed to pay part of plaintiff's compensation was distinctly a question of fact, which a jury should determine. We find no occasion to disturb their verdict.

2. The complaint was on a quantum meruit. At the close of the testimony, plaintiff's counsel asked permission to amend the complaint so as to declare on an express contract to pay a commission of \$480. What then took place was somewhat informal, but we construe the ruling of the court as a grant of permission to so amend. All the evidence had been directed toward proof by plaintiff and disproof by defendant of an express contract. The amendment was in fact unimportant. Under a complaint alleging a quantum meruit plaintiff might have recovered on an express contract which he had fully performed on his part. *Meyer v. Saterbak*, 128 Minn. 304, 150 N. W. 901; *Northwestern Marble & Tile Co. v. Swenson*, 139 Minn. 365, 166 N. W. 406. The allowance of the amendment was not error.

3. The original complaint alleged that plaintiff was to receive \$960, of which defendant and Mortenson were each to pay half, and that Mor-

tenson had paid \$480, his half. Defendant contends that after the complaint had been amended so as to assert a demand of only \$480, this admission in the original complaint of payment of \$480 was an admission that the claim of plaintiff against defendant had been paid. It seems clear to us that this contention cannot be sustained.

4. The court submitted the question whether defendant made such a contract as plaintiff claims was made. Defendant excepts to the manner in which the court submitted this question. He told the jury that it was plaintiff's claim that defendant agreed to pay half the commission, if Mortenson would not pay the whole. This was not quite accurate. Plaintiff's testimony was stronger than this. He testified to a conversation to this effect on one occasion, but to a positive unqualified promise on others. The instruction did not prejudice defendant. Plaintiff had more right to complain of it.

5. Defendant contends that plaintiff cannot recover a commission from him, because plaintiff, while the negotiations were still pending, entered into negotiations with Mortenson to acquire the flat property which he received from defendant in exchange.

The testimony on this subject was as follows: Mortenson refused to deal, unless a certain amount of cash could be raised by a second mortgage on the flat buildings, and plaintiff thereupon entered into negotiations for securing a second mortgage loan, and later did procure such a loan for an amount satisfactory to Mortenson. As to plaintiff's negotiation for an interest in the property, Mortenson testified that "there was an understanding * * * that he was to trade those flats off again and turn them into flats (cash) as fast as he could and if he couldn't make a deal satisfactory that he might take them off my hands." Plaintiff testified that before the deal was closed he made Mortenson a proposition as to what he would give for the flat buildings in cash and exchange, but that this was not agreed on until after the deal was closed, that, about 20 days after the deal between defendant and Mortenson was closed, plaintiff did acquire the flat buildings.

If the extent of the broker's agency is to bring the contracting parties together, and if after doing so he stands indifferent between them and permits them to make their own bargain, he is termed a middleman. *Geddes v. Van Rhee*, 126 Minn. 517, 520, 148 N. W. 549; *American*

Security & Inv. Co. v. Penney, 129 Minn. 369, 152 N. W. 771; Littlefield v. Bowen, 90 Wash. 286, 155 Pac. 1053, Ann. Cas. 1918B, 177, note p. 185, and plaintiff argues that one sustaining that relation is under no obligation to disclose to either his relations or negotiations with the other. Friar v. Smith, 120 Mich. 411, 79 N. W. 633, 46 L.R.A. 229; Langford v. Issenbuth, 28 S. D. 451, 134 N. W. 889. But plaintiff was more than a middleman. He did more than merely bring the parties together. He negotiated for both parties. As above stated, a broker negotiating for both parties may recover compensation from both, if they, with full knowledge of the facts, so agree. But he owes to each the same good faith that he would have owed to either had he been agent for him alone. Daugherty v. Stocks, 185 Mo. App. 541, 172 S. W. 616. Yet each must know that he cannot expect the broker to look out for his interests alone. In the very nature of things such a broker must represent both sides. The real question is whether the broker has placed himself in a position where there might be a conflict between duty and opportunity. Clopton v. Meeves, 24 Idaho, 293, 133 Pac. 907. This court has been justly exacting in its requirement of fidelity on the part of an agent towards his principal. Donnelly v. Cunningham, 58 Minn. 376, 378, 59 N. W. 1052. We are not disposed to relax in this particular. But the law will not deny a broker compensation from one party because of negotiations with the other, if the negotiation is open, and known to, and assented to, by both parties.

We are now confronted with this situation. Defendant's answer did not plead bad faith on the part of plaintiff as a defense. It simply denied that plaintiff rendered services for defendant, or was employed by him, or that he agreed to pay plaintiff, and alleged that plaintiff was the agent of Mortenson alone. The testimony above mentioned was elicited on cross-examination of plaintiff and of his witness Mortenson and was pertinent to the issue pleaded in the answer. Defendant asked for no amendment to his answer to interpose this defense. The court did not submit any such defense or issue to the jury and was not asked to do so. The issue was not litigated. Under these circumstances we should not now set aside the verdict on this ground, unless it is clear, on undisputed testimony as a matter of law that plaintiff was guilty of bad faith. On cross-examination plaintiff was asked if he told defendant of his nego-

tiations with Mortenson and he answered "it seems to me there was some talk to that effect. * * * I wouldn't say for sure." It may be that this testimony would not have been sufficient to sustain a finding that plaintiff made disclosure to defendant of his negotiations with Mortenson. But no such issue was then before the court. If it had been, plaintiff's testimony might have been more explicit. We do not think we should say as a matter of law that plaintiff concealed the facts from defendant. This court should hesitate to set aside a verdict on grounds that parties during the trial do not see fit to make part of their case. We decide that we should not do so upon the record in this case.

6. Defendant contends that plaintiff made misrepresentation to him as to the price at which Mortenson held his farm and for that reason should not recover. No such defense was pleaded nor mentioned until after the trial and verdict. The evidence on the point is unsatisfactory. We find no occasion to disturb the verdict on this ground.

7. Certain letters containing immaterial matter were received in evidence, for the sole purpose of corroborating the testimony of plaintiff as to the date on which he opened negotiations with defendant. The reception of this testimony for this purpose was proper.

Order affirmed.

JOSEPH BAUER v. O'BRIEN LAND COMPANY.¹

November 14, 1919.

No. 21,383.

Exchange of property — rescission after conveyance to innocent party.

1. Plaintiff was induced to trade farms with defendant through the latter's misrepresentations, and he sues for rescission. On the trial it appeared that, before plaintiff discovered the fraud practiced upon him and before his offer to rescind, defendant had conveyed to innocent third parties the farm deeded to it pursuant to the agreement to trade. It is *held* that the measure of restitution is the value of the farm which plaintiff parted with at the time the trade was made, and not what defendant afterwards received on a sale thereof.

¹Reported in 174 N. W. 736.

Decision supported by findings.

2. The findings that defendant made false representations as to the farm it traded for plaintiff's are amply sustained as to several material matters alleged in the complaint, and these support the judgment, even though as to others the evidence be insufficient. The finding as to the value of the farm plaintiff parted with has support.

Election of remedy — when restitution is impossible.

3. A defrauded party, by offering to rescind, does not thereby forego his equitable remedy of rescission. He still has his election to sue in equity for rescission or at law for damages. And if he sues for rescission, the court is not divested of jurisdiction to proceed, if it develops that restitution in kind cannot be had because, prior to the offer to rescind, the other party to the transaction had disposed of the property obtained to good faith purchasers without notice of fraud.

Harvesting of crop not waiver of fraud when contract is divisible.

4. The evidence does not conclusively show a waiver of the misrepresentations. The contract for the exchange of the farms had been consummated when plaintiff discovered the fraud so far as the transfer of the title was concerned, but not as to the part thereof relating to the leasing. When defendant refused to rescind and threw upon plaintiff the duty to harvest and care for the crops, his so doing should not be construed as a waiver of the fraud. Furthermore, the deeding and the leasing may be considered as divisible parts of the contract, so that the one could be rescinded and the other carried out.

Action in the district court for Traverse county for rescission of a contract to trade farms and for reconveyance of land in Traverse county, or for \$52,274. One defense was that the court was without jurisdiction of the subject matter of the action or to grant equitable relief therein, for the reason that the plaintiff had a full, complete and adequate remedy at law. The case was tried before Flaherty, J., who made findings and ordered judgment in favor of plaintiff as stated in the third paragraph of the opinion. Defendant's motion for a new trial was denied. From the judgment and from an order denying its motion for a new trial, defendant appealed. From an order denying his motion to modify finding of fact No. 27 and conclusion of law No. 6, and change the judgment, plaintiff appealed. Affirmed on both appeals.

Boyeson & Flor and Wolfe & Schneller, for plaintiff.

Daniel H. Grady and R. S. Jones, for defendant.

HOLT, J.

Action for rescission and restitution based on defendant's fraud inducing plaintiff to trade farms.

Plaintiff owned a 480-acre farm near Graceville, this state, and defendant a 320-acre farm near Pawnee, Nebraska, when negotiations for a trade were opened between them in the fall of 1916. In March, 1917, a contract for exchange was executed, and shortly thereafter deeds were passed. In July, 1917, plaintiff discovered that representations made by defendant as to the Nebraska farm were false. His attempt to rescind having failed, this action was instituted.

The complaint avers misrepresentations as to the value of the Nebraska farm, the acreage under cultivation, the terms under which it was rented, and the title. The findings are to the effect that the defendant did make material misrepresentations in those respects, which induced plaintiff to make the exchange; that the latter did not discover their falsity until shortly before the action was brought; that upon the discovery of the fraud he offered to rescind, tendered a reconveyance of the land deeded to him, and offered to restore all he received; that defendant refused to accept the tender; that prior to plaintiff's offer to rescind defendant had sold and conveyed the farm it received to good faith purchasers, and that the value of plaintiff's equity in that farm, with interest from the time of the transaction, was \$23,540.84, for which sum judgment was ordered in plaintiff's favor. Both parties appeal from the judgment.

Plaintiff's appeal is based upon the proposition that, since by fraudulent misrepresentations defendant induced plaintiff to convey, it became a trustee de son tort accountable as such to plaintiff for the land conveyed and its proceeds. Plaintiff at the trial announced his desire to limit the evidence offered upon the amount of restitution to the proceeds obtained by defendant when it sold the farm, claiming whatever defendant realized from its disposition and not its value at the time the exchange was effected. We think plaintiff's contention unsound. Defendant obtained the title to the farm with full right of disposition. Plaintiff so intended when he delivered the deed. Notwithstanding the fraud, defendant remained the owner, both legally and equitably, until there was a rescission either by the court or by plaintiff's own act. Had de-

defendant disposed of the farm after plaintiff's attempted rescission, a different question would have been presented. The sale then would have been a legal wrong upon plaintiff.

The status of the parties prior to plaintiff's offer to rescind was not the same as in *Dybdal v. Fagerberg*, 102 Minn. 130, 112 N. W. 1018, relied on by plaintiff. There, as well as in *Darling v. Harmon*, 47 Minn. 166, 49 N. W. 686, the grantee in a deed, which was in fact a mortgage, had, without the grantor's knowledge or consent, sold the property. When such deed was given it was never intended that the grantee could or would sell. Hence the sale constituted a conversion, and the grantor could recover the then value of the land or the proceeds.

In the case at bar, until there was a rescission by the act of plaintiff the Graceville farm must be regarded even in equity as defendant's to be dealt with as its property, hence, by the act of selling or trading it, prior to the rescission, no trusteeship *de son tort* was created. The wrong was committed when the farm was obtained by means of fraud, and, since it cannot now be restored, its value, with interest since the transaction, must measure the restitution that equity will award. In this respect equity should follow the well established rule of compensation applied in actions at law for fraud inducing an exchange of property. *Nelson v. Gjestrum*, 118 Minn. 284, 136 N. W. 858. Thereby plaintiff is not wronged. When he traded, he intended to part with the Graceville farm for good, and at its then fair market value. If he did overreach defendant in the trade, equity ought not to be overly anxious to secure to him his good bargain. It is enough when he gets full value for that which he intended to part with.

The defendant challenges many findings, and contends that upon the facts found and the undisputed evidence two complete legal defenses are shown. In addition, error is assigned upon three rulings permitting answers to certain questions over defendant's objection. The testimony elicited by the questions is of such slight, if any, bearing on the issues that no reversal can be predicated on the rulings, and no further reference will be made thereto.

An attentive perusal of the record convinces us that the trial court was so amply justified in finding that false representations were made in respect to the value of the Nebraska farm, the acreage under cultivation,

and the terms upon which it was then rented that, under the well established practice guiding this court, we cannot disturb them. That being so, plaintiff was clearly entitled to rescission even if some of the other findings be without support, unless the alleged legal defenses, claimed by defendant, prevent. In passing, we only observe that whether the representation as to value was merely the usual trade talk upon which plaintiff had no right to rely, or whether, in view of the situation of the parties, it amounted to an actionable fraud, if false, was for the trial court to determine. Nor does the testimony of plaintiff that he did not wholly rely upon the representations made to him defeat his action for rescission. *Kraus v. National Bank of Commerce of Mankato*, 140 Minn. 108, 167 N. W. 353; *Schmidt v. Thompson*, 140 Minn. 180, 167 N. W. 543. The finding that the Graceville farm was worth \$75 per acre when the deal was made must be held supported. The price fixed upon it in the trade was \$85 per acre. Plaintiff testified that that was the true value, whereas defendant's witnesses placed it from \$50 to \$60 per acre. Such being the evidence it is plainly our duty to let the finding stand. An attempt to analyze or excerpt the voluminous testimony bearing on the findings made, or on those requested, would be of no future use for the bench or bar, and we forbear.

One of the claimed legal defenses, above alluded to, is that the record discloses plaintiff to have an adequate remedy at law for damages; therefore this suit should have been dismissed, and he should have been relegated to his action at law. And, because this was not done, defendant also predicates error in that he lost his right to a jury trial on the question of damages. At no time during the trial did defendant intimate a desire to have a jury determine any issue in the case, and we think it is not now in position to complain of deprivation of a jury to pass on the value of the farm it obtained by misrepresentation. As we understood the argument of defendant, it was conceded that the complaint states a cause of action in equity, but the contention is that, when it appeared that plaintiff had rescinded by his own act, his cause of action in equity was gone, and there only remained an action at law for damages. It is also urged that the same consequence resulted when it appeared that restoration could not be had, because, before suit, the farm had been disposed of to innocent good faith purchasers. We think neither the one nor the other

of these facts, nor the two together, ousted the court of its power to proceed to final adjustment of the rights of the parties.

It is true that, where a defrauded party has rescinded by his own act, he may sue at law and recover as damages the value of what he parted with. *I. L. Corse & Co. v. Minnesota Grain Co.* 94 Minn. 331, 102 N. W. 728. But that does not mean that, where his offer of rescission had been spurned, he may not pursue his remedy in equity. His unaccepted tender of rescission did not destroy the equitable remedy. Had defendant held the title to the Graceville farm at the time of trial, or had the then owners become such with notice of the fraud practiced on plaintiff, there could be no question but that the suit would be in equity. Because plaintiff was unable to prove that the persons to whom defendant conveyed had notice of the misrepresentations, did not divest the court of the power to proceed to do equity in the case by requiring a money restitution of the value of the farm. It may also be suggested that a decree in equity, annulling the deal as far as it could be done, was necessary to relieve the plaintiff from the assumption clause to pay the \$13,000 mortgage in the deed of the Nebraska farm, to the extent that defendant might seek to avail itself thereof.

The complaint states a good cause of action for rescission for fraud and restoration of what was parted with. Predicated on the fact of rescission, plaintiff was entitled to such relief in the action, legal or equitable, as the facts proved required. *Hoffman Motor Truck Co. v. Erickson*, 124 Minn. 279, 144 N. W. 952. "When a court of equity once takes jurisdiction of a case it is its duty to determine all rights and obligations pertaining to the subject-matter and to grant full measure of relief. Though a party fails to prove some fact alleged, necessary to the full measure of the relief demanded, if he proves facts within the allegations of his complaint entitling him to some relief it must be awarded to him." 2 Durnell, Minn. Dig. § 5041. Assuming that the court was right in holding that there was no waiver of the fraud after knowledge thereof, the suit remains in equity and the rule in *Marshall v. Gilman*, 47 Minn. 131, 49 N. W. 688, does not apply.

The other law proposition urged as a defense is that the record conclusively shows a waiver of the fraud and affirmance of the transaction after knowledge of the deception, hence an action for rescission cannot

be maintained. As a general rule, a party who has been induced to enter an executory contract through fraud affirms the contract or waives his right to rescind if, after discovery of the fraud, he avails himself of any provision of the contract or continues to receive benefits thereunder. *Crooks v. Nippolt*, 44 Minn. 239, 46 N. W. 349; *Wagner v. Magee*, 130 Minn. 162, 153 N. W. 313. Do the facts in this case show a waiver of the fraud so that an action for rescission does not lie?

It is to be noted that when the fraud was discovered the contract of exchange had been virtually fully executed. The respective deeds had been executed and delivered. It is true, the contract contained a provision under which, for the farming season of 1917, plaintiff became a tenant of the Graceville farm. But this was a mere incidental matter to the main transaction. Plaintiff had planted and cultivated the crop, when, in July, he discovered the fraud. At that time defendant had conveyed the land to two different parties. Plaintiff did not know whether these were bona fide purchasers or not, nor what rights they had to the rent. He offered to rescind. Defendant refused. Suit was promptly brought, and was pending when the acts from which defendant claims waiver occurred. The crops had to be gathered. Defendant insisted on being the landlord, entitled to a share as the crops were harvested and to the cash rent. To avoid a lawsuit on account of the tenancy, plaintiff acquiesced in defendant's demands. Under these circumstances, his remaining in possession for the purpose of caring for the crop and turning over the share defendant insisted on having, should not be held a waiver of the fraud or an affirmation of the land deal. *Mayer v. Knudsen*, 126 Minn. 85, 147 N. W. 819, holds that acts tending to show a recognition of a contract as still in force, after discovery of the fraud tainting its inception, do not necessarily amount to an affirmation. It depends on the surrounding circumstances. And in *Clark v. Wells*, 127 Minn. 353, 149 N. W. 547, L.R.A. 1917F, 476, a defense of waiver of the fraud and affirmation of the contract was attempted in an action to recover the purchase price paid for a business sold through the defendant's fraud, where, after discovery thereof, the plaintiff's offer to rescind had been refused, but it was held that the fraud was not waived or the contract affirmed by the plaintiff remaining in possession and continuing the business. Some one had to take care of the property and business.

The defendant's refusal to so do, whereby the responsibility was thrown upon the plaintiff therein, should not work to the latter's disadvantage. So here we think that defendant should not be allowed to escape the consequence of its fraud, by taking advantage of the situation it placed plaintiff in by wrongfully refusing the tendered rescission. This suit was pending when every act now relied on by defendant to show waiver was done. Neither party contemplated that such acts were done with a view to affect the pending cause of action.

There is another view which leads to the same result. As above stated, the leasing was a mere incident to the exchange of the farms. No fraud or misrepresentation related to the subject matter or the terms of the lease of the Graceville farm. The contract, so far as the exchange of the farms was concerned, had been fully executed when the fraud was discovered. The terms of the lease do not appear to form any part of the consideration for the exchange of the farms. The contract may be considered divisible, and a performance of the unexecuted part as not affecting the part executed and to which alone the fraud related. In *Edward Thompson Co. v. Schroeder*, 131 Minn. 125, 154 N. W. 792, a written contract for the purchase of two sets of books was held divisible so that the purchaser, who had been induced to enter the contract through misrepresentations concerning one set, could rescind as to that. *Bank of Antigo v. Union Trust Co.* 149 Ill. 343, 36 N. E. 1029, 23 L.R.A. 641.

We think the judgment should be affirmed on both appeals.

MALCOLM E. NICHOLS v. THE KISSEL MOTOR CAR
COMPANY AND ANOTHER.¹

November 14, 1919.

No. 21,392.

Motion for judgment notwithstanding verdict.

1. By moving for judgment notwithstanding the verdict but not for a new trial, defendant waived all questions except its contention that the verdict is without support in the evidence.

¹Reported in 174 N. W. 733.

Sale — question for jury.

2. Evidence examined and held sufficient to make a question for the jury as to whether the company which sold plaintiff's automobile made the sale as agent of defendant company.

Action in the district court for Hennepin county to recover \$433.97. The Kissel Motor Car Company in its separate answer expressly denied that defendant John F. Lynch acted for or as the agent of defendant or had any authority so to act in respect to any of the transactions alleged in the complaint. The case was tried before Jelley, J., who when defendants rested denied their motion for a directed verdict in favor of the Kissel Motor Car Company and granted their motion for a directed verdict in favor of defendant Lynch, and a jury which returned a verdict for \$425.91. From the order denying its motion for judgment notwithstanding the verdict, the Kissel Motor Car Company appealed. Affirmed.

Barrows, Stewart & Metcalf, for appellant.

William P. O'Brien and *T. P. McNamara*, for respondent.

TAYLOR, C.

Defendant, "Kissel Motor Car Company," is a Wisconsin corporation which manufactures an automobile known as the Kissel car at Hartford, Wisconsin. Its selling agent for Minnesota is the "Northwest Kissel Kar Branch," a Minnesota corporation having its principal place of business in Minneapolis. The Minnesota corporation opened a place of business in St. Paul and employed defendant Lynch to take charge of it as manager. It conducted its St. Paul business under the name of "Kissel Kar Company" instead of under its proper corporate name. Lynch, as manager of the Kissel Kar Company, sold a car to plaintiff under a contract which provided for the payment of a part of the purchase price in monthly instalments, and further provided that the Kissel Kar Company should retain ownership of the car until paid for. Plaintiff failed to make his payments as they became due, and finally turned the car over to the Kissel Kar Company, under an agreement that they should sell it and take the amount of his indebtedness out of the proceeds and pay him the balance. They sold the car for considerably more than

the indebtedness, but failed to pay the excess to plaintiff. The Minnesota corporation having become insolvent, plaintiff brought this suit against the Wisconsin corporation and Lynch to recover the excess above his indebtedness realized from the sale of the car.

The jury returned a verdict in favor of defendant Lynch, but against defendant company. Defendant company, which will hereafter be designated as defendant, made a motion for judgment notwithstanding the verdict but not for a new trial. This motion was denied and defendant appealed from the judgment subsequently entered.

By resting its case on a motion for judgment notwithstanding the verdict, defendant waived all questions except its contention that there is no evidence reasonably tending to sustain the verdict. Dunnell, Minn. Dig. and 1916 Supp. § 393, and cases cited.

That the car was sold for more than the amount of plaintiff's indebtedness and that plaintiff is entitled to the excess is undisputed, and the sole question now in controversy is whether the Minnesota corporation, in selling the car and receiving the proceeds of the sale, was acting as the agent of defendant. We think there was sufficient evidence to make this a question for the jury.

We will not take the space to give a synopsis of the evidence, but will merely indicate some of the items.

The car was purchased in the early part of 1912 through Lynch, the manager of the St. Paul business of the Minnesota corporation. On February 28, 1912, defendant, in answer to an inquiry from plaintiff, wrote him that his car would be ready for shipment the following day. On January 28, 1913, defendant answered an inquiry of plaintiff concerning further equipment for his car and among other things wrote:

"We are certainly pleased to note that Mr. Lynch, our St. Paul representative, has taken care of your car at all times and that your car is giving you very good satisfaction at the present time.

"In case you wish to order any new equipment for your car, we would be pleased to have you take this up with Mr. Lynch, who can forward the order to us, and same will have our immediate attention.

In reply to a letter from plaintiff, apparently eulogizing Mr. Lynch, defendant wrote on January 31, 1913, that they had always thought a

great deal of Mr. Lynch because he had tried hard to maintain the policy of the company and that he had their co-operation.

On June 24, 1913, the general attorney of defendant wrote plaintiff that his attention had just been called to the fact that plaintiff was still indebted to the Kissel Kar Company of St. Paul on the purchase price of the car and stated:

"I was very much surprised to hear that this transaction was still open, and I am obliged to say to you, Mr. Nichols, that we must insist upon payment of this account without any further delay. We are always more than willing to accommodate Kissel Kar owners and customers in every respect possible, but you must certainly appreciate the fact that it takes a vast amount of money to keep this organization running and that we must pay our bills promptly when due, and while we wish to be very lenient, we must insist that our customers do likewise. * * * Please give this matter your immediate attention and do not compel us to resort to any harsher means to collect this balance."

This letter was written from the home office of defendant and was signed by the attorney as attorney for defendant.

A letter dated July 28, 1913, to the Kissel Kar Company of St. Paul concerning plaintiff's car stated:

"You are hereby instructed to take possession of this car and hold it until all payments now due and which will become due are taken care of, or until some satisfactory adjustment is made. We cannot allow the matter to run any longer as it is."

This letter was written from the home office of defendant, was signed in the corporate name of defendant and was written by its attorney. At the time this letter was written, Lynch had the car for the purpose of making some repairs, and, instead of returning it to plaintiff, made the arrangement with him under which the car was sold as hereinbefore stated.

Defendant contends that other evidence conclusively established that defendant sold the car outright to the Minnesota corporation, and received the full purchase price from that corporation in 1912; that defendant was not a party to the contract with plaintiff and had no interest in the moneys paid by plaintiff, and that the letters written by its attorney, demanding payment from plaintiff and directing the Kissel Kar

Company of St. Paul to take possession of the car, were written solely because Lynch requested the attorney to write them to aid him in collecting the balance due from plaintiff, and were written merely to oblige Lynch and not because defendant had any interest in the transaction. The authority of the attorney to write them on behalf of defendant is not denied.

We are unable to say that the evidence is conclusive in defendant's favor or that the verdict finds no support therein and consequently cannot direct judgment notwithstanding the verdict.

Judgment affirmed.

F. P. SHELDON v. C. M. PADGETT AND ANOTHER.
G. W. LIND, APPELLANT.¹

November 14, 1919.

No. 21,420.

Notice of assignment of wages for labor on timber products.

1. By the enactment of chapter 309, Laws of 1905 (section 3958, G. S. 1913), which contains no repealing clause, it was not the legislative intent to repeal or modify the provisions of section 7059, G. S. 1913, as to giving notice of the assignment of wages for labor upon timber products.

Assignment in writing of labor claim.

2. A time check issued by a contractor to a laborer, containing a memorandum of the labor and the amount he is entitled to receive therefor, is evidence of his claim for such labor, and the indorsement in blank of such check and delivery thereof is an assignment in writing of the claim as required by section 7059 of the statutes.

Log and logging — lien statement.

3. In perfecting a lien statement for wages for labor upon timber products under the provisions of section 7059, G. S. 1913, where the timber products are not all marked by registered log marks, it is sufficient to attach the original assignments of the claims to the statement filed in the office of the surveyor general of logs and lumber, and copies of such assignments to the statement filed with the clerk of the district court of the county.

¹Reported in 174 N. W. 827.

Same — recovery of attorney's fee.

4. In an action to enforce a lien for wages for labor upon timber products, claimant is, under the provisions of section 7067, entitled to recover \$10 statutory costs, and in addition thereto \$20 attorney's fees.

Action in the district court for Koochiching county to recover \$150.55 and foreclose a mechanic's lien therefor upon certain logs and timber products with \$20 attorney's fee. The answer was a general denial. The case was tried before McClenahan, J., who made findings, ordered judgment in favor of plaintiff and declared the judgment to be a specific lien for the work performed, together with the indorsed time checks attached in the office of the clerk of court. From the judgment entered pursuant to the order for judgment, G. W. Lind appealed. Affirmed.

S. H. Eckman, for appellant.

J. H. Brown, for respondent.

QUINN, J.

Action against defendant C. M. Padgett, a logging contractor, to recover for manual labor, in cutting and hauling certain logs, ties, poles, posts and pulp-wood, rendered to him by the plaintiff's assignors, and to establish a lien therefor on such timber products owned by and in the possession of the defendant G. W. Lind. There was no appearance on behalf of the defendant Padgett. The cause was tried to the court, and findings of fact and conclusions of law were made that the plaintiff was entitled to judgment against the defendant Padgett for \$150.55, with interest and costs, which was declared to be a lien on the timber products in question, and that judgment be entered accordingly. The defendant Lind appealed from the judgment so entered.

This action is one of 29 of the same nature brought by divers plaintiffs against the above named defendants to enforce liens for manual services in cutting and hauling timber products,¹ gotten out by the defendant Padgett as an independent contractor for the defendant Lind in Koochiching county during the logging season of 1916-1917. All such actions were tried and submitted at the June, 1917, general term of the district court of said county, upon substantially the same evidence. By stipulation of the litigants this and eight other of such cases were submitted to abide the final result herein.

¹ See *Watson v. Padgett*, and footnote, page 462.

It appears from the record and findings of the trial court, that the labor involved in this action was performed by 11 men and completed between October 1, 1916, and February 14, 1917; that on March 16, 1917, the men were given time checks for their work, which they indorsed in blank and delivered to the plaintiff, who cashed the same; that on the same day the plaintiff caused to be filed for record in the office of the surveyor general of logs and lumber for the Fifth district of Minnesota, in which such property then was and in which such labor was performed, a duly verified lien statement for all of said labor and services, together with the time checks thereto attached, and caused to be filed for record in the office of the clerk of the court of said county a similar lien statement for such labor and services, together with copies of the time checks attached thereto; that a portion of said timber so gotten out was marked "B-5," but it does not appear that such mark was ever recorded; that a portion was marked "Min" and "Lind;" that no written notice of the assignment, sale or transfer of any of such wages was ever given to the defendant Padgett, and that this action was brought prior to April 1, 1917.

It is urged on behalf of appellant that there was no valid assignment to the plaintiff of the wages of the various laborers, under the provisions of section 3858, G. S. 1913, being chapter 309, § 1, p. 493, Laws of 1905, which provides in effect that no assignment of wages shall give the assignee any right of action in law or equity, unless a written notice thereof be given to the employer within three days after the assignment. There is no question as to the sufficiency of the assignment in the present case, unless the same is rendered void by the statute referred to. A time check issued by a contractor to a laborer, as in this case, containing a memorandum of the amount of such labor, properly indorsed in blank, coupled with a delivery thereof, is a sufficient assignment in writing of the claim for labor, contemplated by the provisions of section 7059, G. S. 1913. *Small v. Smith*, 120 Minn. 118, 139 N. W. 133.

The lien statute was enacted in 1899. It is complete in itself. It provides, in effect, that any person having a claim for labor upon logs, cross-ties, poles or other timber, may assign the same in writing to any person either before or after the making and filing of the lien statement therefor as provided therein, and that the person to whom such assignment is

made shall be subrogated to all the rights of the original claimant, and may enforce the lien in the same manner and with the same effect as the original claimant might have done. The act provides how the claim may be assigned and how the lien may be enforced. It is in the nature of a special act designed to cover a particular class of work. Section 3858 is a general act and might control the prior act if it were intended to have that operation, but, where it is apparent that the subsequent act shall not so operate, then it will not be given such a construction. *State v. Western Union Tel. Co.* 111 Minn. 21, 124 N. W. 380, 126 N. W. 403.

While it is true the language of the later act is broad, providing that no assignment of any wages or salary shall give any right of action to the assignee, unless a written notice, together with a copy of the assignment, be given to the employer within three days, yet we are of the opinion that it was not the intent of the legislature that such act should modify or repeal the lien law under consideration. To so hold would, in effect, defeat the purpose of the lien law. That act provides for the assignment of claims for wages of this particular class, either before or after the filing of the lien statement. Such claims are generally small in amount. They are held by the workman for labor upon the timber products, generally in some remote part of the state. It was the purpose of the legislature to simplify and make easy the assignment and enforcement of such claims. Unless so made, the purpose of the law would be practically defeated. It was not the purpose of the legislature to interfere with or in any manner modify the provisions of the lien statute by the enactment of section 3858. Every object of that act may be carried out without interfering with the lien statute. It contains no repealing clause.

The statute requires the lien statement to be filed in the office of the surveyor general of logs and lumber when the timber is marked with a registered log mark; otherwise in the office of the clerk of the district court of the county, with the assignment of the claims attached thereto. It is urged that the filing in the instant case was not sufficient to perfect the lien, in that the original assignments were attached to the statement filed in the office of the surveyor general and only copies of the same attached to the statement filed with the clerk, and for this reason the lien claim was never perfected. We are unable to understand what more

could have been done. The timber products were not all marked alike. We think the lien statements sufficiently complied with the statute.

There is no merit in the objection urged by the appellant to the allowance of costs, disbursements and attorney's fees in this action. There was an allowance by the trial court of \$10 as statutory costs and \$20 attorney's fees. Section 7067, G. S. 1913, provides for "the costs allowed in ordinary actions in the district court and in addition thereto an attorney's fee of twenty dollars." As said by the learned trial judge: "By 'ordinary actions' * * * was meant such as are included in the term 'all other actions' as used in section 7974, G. S. 1913, and not equitable actions wherein costs may be allowed or not by the court under section 7978.

It is common knowledge that, before the amendment of the law so as to allow attorney's fees in log lien cases, a laborer with a small claim was often without a practical chance to enforce it, because he could not afford to employ an attorney, and it was the expressed purpose of chapter 342 [p. 432], Laws 1899, which furnished the basis of the present statute, to provide an attorney's fee, in addition to and not as a substitute for the costs theretofore allowed by statute, which costs belonged to the party recovering them and not to his attorney. *Davis v. Swedish Am. Nat. Bank*, 78 Minn. 408, 420, 80 N. W. 953, 81 N. W. 210, 79 Am. St. 400. Chapter 342 provides for a reasonable compensation for necessary legal services, collectible out of the property involved and to that extent relieving the claimant from the hardship of losing his wages, or a substantial part of them, even though successful in his action to enforce his lien."

The allowance of \$20 as attorney's fees as made by the trial court in addition to the statutory costs was proper. There were also allowed as disbursements, sheriff's fees, \$4.40 and court commissioner's fees, \$1.50. We find no error in these items.

The question is here raised that it does not appear from the proofs that the work was completed. The point was not raised in the court below. But we think the evidence fully supports the finding. The defendant Padgett was an independent contractor for appellant in getting out the timber. He issued time checks on appellant to the laborers for work per-

formed. The issuance of these checks was evidence of the completion of the work.

Affirmed.

Brown, C. J., took no part in this case.

**SOPHIE BERMAN AND OTHERS v. MINNEAPOLIS PHOTO
ENGRAVING COMPANY AND OTHERS.¹**

November 14, 1919.

No. 21,434.

Injunction pendente lite — review of order.

1. Whether an injunction pendente lite shall be issued, rests so largely in the discretion of the trial court that this court will not interfere unless an abuse of such discretion be shown.

Appeal and error — refusal of order — questions of fact.

2. On an appeal from an order refusing an injunction pendente lite, the order must be taken as resolving against the appellant all questions of fact which the evidence leaves in doubt.

Corporation — issue of stock — evidence insufficient.

3. The evidence in support of plaintiff's contention that part of the capital stock in controversy was issued by the company without consideration, and that the other part was issued prematurely, is not sufficiently clear and certain to justify so holding as a matter of law.

Same — meetings of directors — estoppel against stockholders.

4. The stockholders having knowingly, for a period of more than two years, recognized the validity of meetings of the board of directors held without notice to an absent director, who in fact never acted as a director, are precluded from now asserting that such meetings were illegal for failure to give such notice.

Estoppel against plaintiffs.

5. Plaintiffs, having obtained their stock by subsequent purchase from two of the directors who attended the directors' meeting which authorized the issuance of the stock in controversy and who voted for the

¹Reported in 174 N. W. 735.

resolution authorizing such issuance, are not in position to assert that such meeting was illegal.

Action in the district court for Hennepin county for the surrender to defendant corporation for cancelation, of five shares of capital stock, evidenced by certificates issued to defendant Hare, and to enjoin him from voting or selling the stock. From an order, Hale, J., discharging an order to show cause why an injunction should not be granted restraining defendant Hare from voting five shares of stock alleged to have been unlawfully issued to him, plaintiffs appealed. Affirmed.

George B. Leonard and Maurice Rose, for appellants.

Charles F. Keyes, for respondents.

TAYLOR, C.

This is an appeal by plaintiffs from an order refusing to issue an injunction pendente lite.

It is well settled that the issuance of such an injunction rests so largely in the discretion of the trial court that this court will interfere only where a clear abuse of such discretion is shown.

Plaintiffs brought the action to secure the cancelation of five shares of the capital stock of defendant company issued to defendant Hare, and to enjoin defendant Hare from disposing of or voting this stock. The temporary injunction was sought for the purpose of preventing defendant Hare from voting his stock at the approaching stockholders' meeting. The defendants include the present officers of the corporation and are in control of its affairs. If Hare is permitted to vote this stock they can retain such control. If he is not permitted to vote this stock plaintiffs have acquired sufficient stock to give them control. Plaintiffs base their claim solely on the assertion that this stock was illegally issued; they make no claim that the business of the company has been mismanaged in any respect except in the issuance of this stock.

For the purposes of this appeal the refusal of the court to grant the injunction must be taken as resolving against plaintiffs all questions of fact which the evidence leaves in doubt.

Thirty-six shares of the capital stock of the company of the par value of \$100 per share were issued of which E. F. Gross, C. M. Arndt and G.

C. Willey each held ten shares, and J. R. Irrthum and Frank Maxson each held three shares. No other stock has been issued except the five shares now in controversy. Gross, Arndt, Willey and Irrthum composed the board of directors. Gross was president; Irrthum, vice president; Willey, secretary, and Arndt, treasurer.

Early in January, 1918, Gross, acting as general manager of the company, employed defendant Hare as business manager and he has performed the duties of that position ever since. In the summer and fall of 1918, he claimed the right to purchase some of the capital stock of the company on the ground that he had been promised that privilege by Gross and also by other officers of the company. He also made the claim that he was entitled to more salary than he had drawn from the company, and that this back salary should be applied as a payment on the stock. On November 4, 1918, directors Arndt and Willey were appointed a committee to take up the matter with Hare and arrange for the issuance of his stock. They reported to the board at a meeting held on January 14, 1919, to the effect that they had reached an understanding with Hare and had agreed to issue him five shares of stock, of which two and one-half shares were to be in lieu of his back salary, and two and one-half shares were to be paid for in weekly instalments, that ten dollars per week of his salary beginning with October 1, 1918, was to be applied on these instalments, and that the stock was to be issued when the two and one-half shares were paid for. Their action was unanimously approved and ratified by the board. Director Irrthum was not present at this meeting, but subsequently approved the action taken by an indorsement entered upon the record of the meeting.

On February 25, 1919, Gross and Arndt sold their stock of ten shares each to plaintiffs. It was transferred to plaintiffs on the books of the company on the following day, February 26, and on the same day the stock in controversy was issued to Hare.

Plaintiffs contend that Hare was not entitled to the back salary claimed, and that the two and one-half shares issued to him therefor were issued without consideration. They also contend that about thirty dollars of the purchase price of the other two and one-half shares remained unpaid at the time they were issued, and that these shares were prematurely issued for that reason. Passing other questions, which readily

suggest themselves, and assuming that the facts asserted, if established, would warrant the court in holding that the stock was illegally issued, it is sufficient to say that the evidence lacks the clearness and certainty necessary to justify holding as a matter of law that either of the above contentions has been established.

Plaintiff's principal contention, however, is that the directors' meeting of January 14, 1919, was illegal and the action taken thereat of no effect, for the reason that director Irrthum was not present and had not been notified of the meeting.

The business of the company was conducted in an informal manner. There were no by-laws, no regular or stated meetings of the board of directors, and no regulations for calling or giving notice of meetings of the board. Irrthum attended the annual meeting of the company held in March, 1916, and was elected a director and vice president. He seems to have been re-elected to these positions in 1917 and 1918. His business kept him out of the city most of the time. He testified that he never attended either a stockholders' or a directors' meeting after the annual meeting of 1916, never took any part in the business or affairs of the company, did not consider himself a director or act as such, and did not even know that he was elected a director in 1918. The other directors were engaged in the business of the company and managed its affairs as if they constituted the entire board and Irrthum were not a member of it. Whenever they desired to take official action they met on verbal notice and by mutual consent. Apparently no notice was ever given Irrthum of any of their meetings. From March, 1916, until plaintiffs became stockholders in February, 1919, the business of the company was conducted in this manner with the knowledge and acquiescence of all the stockholders and all the officers, and every stockholder who held stock during that period still acquiesces in the validity of such meetings and approves all acts taken at these meetings. Having knowingly recognized the validity of such meetings for more than two years, we think the stockholders are precluded from now attacking their validity on the ground that Irrthum took no part therein and had no notice thereof. See *Dickinson v. Citizens Ice & Fuel Co.* 139 Minn. 201, 165 N. W. 1056; *Union Pacific Ry. Co. v. Chicago, R. I. & P. Ry. Co.* 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. ed. 265.

Furthermore Gross and Arndt were both present and took an active part in the meeting in question, and both approved and voted for the resolution authorizing the issuance of the stock, and neither could now maintain a stockholder's suit to impeach the validity of his own acts. Plaintiffs are in no better position, for they have no interest in the company, except what they acquired by the sale and transfer to them of the stock of Gross and Arndt. As Gross and Arndt, if they had retained their stock, could not attack the validity of this meeting, neither can plaintiffs. *Babcock v. Farwell*, 245 Ill. 14, 91 N. E. 683, 19 Ann. Cas. 74; *Home Fire Insurance Co. v. Barber*, 67 Neb. 644, 93 N. W. 1024, 60 L.R.A. 927, 108 Am. St. 716; *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630, 12 Am. St. 337; *Just v. Idaho Canal & Imp. Co.* 16 Idaho, 639, 102 Pac. 381, 133 Am. St. 140. See note 97 Am. St. 51.

Order affirmed.

**MAX TASLER AND OTHERS v. PEERLESS TIRE COMPANY
AND OTHERS.¹**

November 14, 1919.

No. 21,445.

Corporation — misapplication of funds — appointment of receiver.

1. Where those in charge of the management of a corporation misapply the corporate assets and divert them to their own private use, a minority stockholder may maintain action to compel restoration, and to restrain such misconduct in the future, and, as incident to such relief may, in a proper case, procure the appointment of a receiver.

Action in Minnesota when corporation is organized elsewhere.

2. Such an action may be maintained in this state against officers transacting the corporate business in this state, though the corporation is a foreign corporation.

Authority of receiver.

3. Failure of the court to limit, by order, the authority of the receiver to possession and control of assets within this state, does not oust the court of jurisdiction.

¹Reported in 174 N. W. 731.

Appeal and error — no reversal when points first raised on appeal.

4. Where the place of business of the corporation is in this state and there is no showing of assets elsewhere, and the point is raised for the first time on appeal, this court will not reverse the case because of the failure of the trial court to so limit its order.

Action in the district court for Hennepin county. The facts are stated in the opinion. Defendants' demurrer to the complaint was overruled. From an order, Jelley, J., appointing George R. Smith temporary receiver of defendant corporation, defendants, except N. W. White and G. L. Hicks, appealed. Affirmed.

C. M. Hertig and W. D. Scott, for appellants.

Arthur Schaub and R. H. Fryberger, for respondents.

HALLAM, J.

The complaint alleges that the defendant Peerless Tire Company was organized under the laws of South Dakota; that the office and principal place of business of the corporation are located in Minneapolis, Minnesota; that plaintiffs are the holders of preferred stock in the corporation; that defendant Hicks is the secretary; Meek, the president; Fay, the treasurer, and Scott, the vice president, of the corporation, and the other defendants are past officers and business managers of the corporation; that said defendants organized the corporation for the purpose of defrauding plaintiffs and other stockholders and obtaining from them money for stock with the purpose of using it for their private benefit. That they represented to plaintiffs and other persons that all money paid in would be used in buying automobile tires and selling them at a profit, and that the corporation was doing a paying business and earning profits in buying and selling tires; that, in fact, said defendants sold 2,300 preferred shares receiving \$23,000; that but a small amount of this was ever invested in tires, but that the larger portion was wrongfully and fraudulently used by defendants for their private use; that defendants issued 6,000 shares of common stock, for which the corporation received nothing; that, while misappropriating funds of the corporation, defendants were representing to plaintiffs that the funds were invested for the benefit of the corporation and that dividends were being earned, and dividends of 1 per cent per month were paid for nearly a year, but no

dividends were in fact earned, and that the corporation is now barely solvent; that defendant will, unless restrained, dispose of all the property of the corporation for the private benefit of defendants, and that, if they are allowed to further despoil the corporation as they are about to do, there will not be sufficient funds to pay the creditors of the corporation and that the preferred stock will be a complete loss.

The relief asked for is: First, that defendants account for the management and disposition of the funds and property of the corporation at any time in their charge; second, that they be required to repay all funds and the value of all property wrongfully transferred to them or wrongfully wasted by them; third, that the court remove the defendant officers of said corporation; fourth, that the court appoint a temporary receiver to take charge of the business of defendant corporation until proper officers have been elected by the corporation; fifth, that the court make an order restraining any alienation of the property of the corporation; and, sixth, such other relief as the court may deem just and equitable.

After a hearing, the court, in April, 1918, made an order restraining defendants from alienating or in any way interfering with the property of the corporation and appointing a receiver to take possession of the property, money, books of account, stock subscription books and other records of the corporation. In April, 1919, defendants, except White, now deceased, and Hicks, not served with process, appealed from the order appointing a receiver.

1. The only point presented in defendants' original brief was that the court was without jurisdiction to make the order appointing a receiver because defendant corporation is a South Dakota corporation. It was urged that "there is as entire a lack of jurisdictional facts, as in the case where an administrator is appointed of the estate of a living person." We do not sustain this contention. The complaint stated a cause of action. It alleged that those in charge of the management of the corporation are misapplying the corporate assets and diverting them to their private use, and it asked that the defendants make restoration of the corporate funds and assets and that they be restrained from such misconduct in the future, and, as an incident to such relief, asked for the appointment of a receiver. If this were a domestic corporation no one would

doubt that minority stockholders may maintain such an action, and, upon a sufficient showing, obtain such relief. *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854. If the facts are as alleged in the complaint, it was the duty of the corporation itself to seek redress of the wrong. The alleged wrongdoers include the managing officers and apparently the majority of the stockholders of the corporation. An application to them to bring suit against themselves would be futile and such application is not required. The minority stockholders may themselves sue. *Rothwell v. Robinson*, 39 Minn. 1, 38 N. W. 772, 12 Am. St. 608.

2. Nor do we doubt that such an action may be maintained though the corporation is a foreign corporation. The courts of this state have no "visitorial powers" over foreign corporations. They have no jurisdiction to interfere with their "internal management," that is, they could not enforce forfeiture of charter, nor removal of officers, nor could they exercise authority over corporate functions, nor direct the manner of the transaction of the corporate business. These powers belong only to the state which created the corporation. *Guilford v. Western Union Tel. Co.* 59 Minn. 332, 61 N. W. 324, 50 Am. St. 407; *State v. De Groat*, 109 Minn. 168, 123 N. W. 417, 134 Am. St. 764; *Van Dyke v. Railway Mail Assn.* 118 Minn. 390, 137 N. W. 15, Ann. Cas. 1913E, 455; *North State Copper and Gold Mining Co. v. Field*, 64 Md. 151, 20 Atl. 1039; *Republican Mountain Silver Mines v. Brown*, 58 Fed. 644, 7 C. C. A. 412, 24 L.R.A. 776. But where a foreign corporation locates itself in this state and its managing officers are within this state, the courts of this state have jurisdiction to compel such officers to make restoration of assets unlawfully diverted by them and to restrain them from further unlawful diversion of assets. This is not the exercise of visitorial powers over the corporation, nor is it interference with the management of its internal affairs. The complaint in this case asks some forms of relief which the court could not grant, but this did not destroy the cause of action well pleaded. "It is a general rule of pleading that a party does not lose the benefit of matter pleaded by asking for it a greater effect than it is entitled to." *Townsend v. Minneapolis Cold Storage & F. Co.* 46 Minn. 121, 124, 48 N. W. 682, 683.

3. Nor is there any doubt that as an incident to the granting of such relief the court may appoint a receiver. Our statutes authorize the courts

of this state to appoint receivers to take charge of the assets of foreign corporations within the state, G. S. 1913, § 7892, and they would possess this power without any statute. See *Rittle v. J. L. Owens Mfg. Co.* 136 Minn. 93, 161 N. W. 401. Our courts have no jurisdiction to empower receivers of foreign corporations to take charge of assets of the corporations which are situated outside of the state. The court did not, in its order, limit the authority of the receiver to the control of assets in this state. We are not advised as to whether the corporation has assets elsewhere. The record is silent on the subject. Its place of business is in this state. There is no presumption, so far as we know, of assets beyond our jurisdiction. If the corporation has assets in any other state, the order appointing the receiver should have limited his authority to the administration of assets within this state. But, if there are such assets, this omission did not go to the jurisdiction of the court to make the appointment. The court had jurisdiction of the case and jurisdiction to appoint a receiver with appropriate powers. Failure to charge the receiver to take possession only of assets within the state did not oust the court of jurisdiction in the premises, nor did it affect the validity of the appointment of the receiver insofar as concerns assets within this state.

4. In a reply brief defendants urge that the order appointing a receiver should be reversed, because of this failure of the court to limit the powers of the receiver to possession and control of assets within this state. If this point had been seasonably urged and upon a showing of existence of corporate assets in some other state, we should have been obliged to sustain it. But so far as we can discover from the record it was not raised at any stage of the case until the reply brief in this court. There is no showing that the omission was a material one. We are not disposed to reverse the trial court on a point so tardily presented and with no showing that the corporation, in fact located in this state, has any property elsewhere. If it has, defendants may still apply to the district court for a proper modification of the order appointing the receiver, and the application will doubtless be granted.

Order affirmed.

LEWIS HART v. THE LINCOLN NATIONAL LIFE INSURANCE
COMPANY.¹

November 14, 1919.

No. 21,469.

Appeal from order to make pleading more definite.

1. An order requiring a pleading to be made more definite and certain, and directing that it be stricken out unless the order is complied with, is appealable.

Reversal of trial court's action.

2. The action of the district court upon an application for such an order is largely discretionary, and will not be reversed where substantial rights upon the merits are not affected.

Pleading — requiring specific examples of illegal practices to be pleaded.

3. An order requiring defendant to make its answer more definite and certain by pleading specific instances of unlawful practices on the part of plaintiff, which were known to and relied upon by defendant as justification for canceling a contract with him, does not preclude defendant from showing other instances of misconduct by plaintiff which may subsequently come to defendant's knowledge.

Same — assignment of renewal premiums — striking out part of answer.

4. An assignment of commissions on renewal premiums on policies of life insurance, recited that it was made as collateral security for the payment of premium notes which might be indorsed by the assignor to a bank, and that the bank should be entitled to receive such commissions, upon giving written notice to the defendant setting forth the amount of plaintiff's obligations. Defendant's answer failed to allege that the bank held any notes on which plaintiff was liable or that any notice to that effect had been given to defendant. It was within the discretion of the court to strike out that portion of defendant's answer which alleged the making of such assignment and that the bank, by reason thereof, was a necessary party to the action.

Action in the district court for Ramsey county to recover \$762,500 for breach of contract. From an order, Dickson, J., granting plaintiff's mo-

¹Reported in 174 N. W. 740.

tion to strike out certain portions of the answer and to make it more definite and certain, defendant appealed. Affirmed.

Butler, Mitchell & Doherty, for appellant.

Morphy, Bradford & Cummins, for respondent.

LEES, C.

Appeal from an order striking out a portion of the defendant's answer and requiring it to make another portion of the answer more definite and certain. The action was one for damages for the breach of an agency contract between the parties, defendant having canceled the contract.

Under one of its provisions, the contract terminated and plaintiff's rights under it ceased if he rebated or offered to rebate premiums, or violated the insurance laws of this state. Another provision entitled plaintiff to renewal commissions on premiums collected by defendant after the first, and to a percentage of the first premium on all business he secured.

The answer alleged that plaintiff was discharged for the reason that he had rebated premiums and violated the insurance laws of Minnesota. There was also an allegation that he had assigned his interest in the renewal premiums to the Commercial State Bank of St. Paul, which was not made a party, and that there was a defect of parties plaintiff.

The court struck out all of the answer relating to the assignment to the bank, and required defendant to set out the specific instances of plaintiff's unlawful conduct and practices which were known to it and relied upon as justification for canceling the contract. The order provided that, if the answer was not made more definite as directed, the allegations of unlawful practices by plaintiff should be stricken out.

1. This order was appealable. *Baer v. Waseca Milling Co.* 143 Minn. 483, 171 N. W. 767.

2. The action of the district court upon an application for an order requiring a pleading to be made more definite and certain is largely discretionary, and will not be reversed where substantial rights upon the merits are not affected. *Madden v. Minneapolis & St. L. Ry. Co.* 30 Minn. 453, 16 N. W. 263; *Young v. Lindquist*, 126 Minn. 414, 148 N. W. 455.

It is contended that the order is so framed as to limit defendant, at

the trial, to proof of unlawful conduct which was known to and relied upon by it in canceling the contract, and to preclude it from showing other misconduct by plaintiff which may subsequently come to its knowledge. This contention cannot be sustained. The order does not preclude defendant from pleading every instance of misconduct it may know of, without reference to the time when it learned the facts. If specific instances of misconduct come to its knowledge after answering, the trial court will doubtless permit an amendment setting forth such newly discovered acts of the plaintiff. The order requiring the answer to be made more definite and certain is sustained.

3. Counsel for plaintiff contend that the order striking out the portion of the answer to which we have referred is justifiable on three grounds: (1) That the action is not brought to recover commissions but damages for breach of contract; (2) that it is not alleged that plaintiff was indebted to the bank; (3) that it is not alleged that the bank notified defendant that it held any obligations against plaintiff.

The first contention is of doubtful validity. The contract between plaintiff and defendant is not clear as to the right of the former to commissions on renewal premiums in case the latter wrongfully terminated the agency. If the agency was rightfully terminated, plaintiff could no longer claim an interest in the renewal premiums. If wrongfully terminated, it may be that his sole remedy would be an action for breach of contract, in which the probable value of his interest in future premiums would be an element of his damages. This appears to have been plaintiff's theory in bringing this action, for damages are laid at \$762,500. The briefs have not enlightened us on this point and we have found little direct authority upon it. Much depends upon the language employed in the contract. See 2 Joyce, Ins. § 695; Crowell v. Northwestern Nat. Life Ins. Co. 99 Minn. 214, 108 N. W. 962; Israel v. Northwestern Nat. Life Ins. Co. 111 Minn. 404, 127 N. W. 187; Stier v. Imperial Life Ins. Co. (D. C.) 58 Fed. 843; Wheeler v. Hartford Life Ins. Co. 227 Fed. 369, 142 C. C. A. 65; Ensworth v. New York Life Ins. Co. 8 Fed. Cas. 4496; Lewis v. Atlas Mut. Life Ins. Co. 61 Mo. 534; N. C. State Life Ins. Co. v. Williams, 91 N. C. 69, 49 Am. Rep. 637.

The second and third contentions are sustained. Plaintiff, defendant and the bank were all parties to the assignment which was executed in

triplicate. It purports to assign to the bank, as collateral security for the payment of premium notes indorsed over by plaintiff, all commissions on premiums subsequent to the first to which plaintiff may be entitled under his contract with defendant. It provides that such commissions shall be applied to the payment of such obligations of the plaintiff to the bank as were not paid when due, upon the giving of written notice by the bank to defendant setting forth the amount of such obligations. The answer did not allege that the bank actually held any notes upon which plaintiff was liable as indorser or otherwise, or that any notice to that effect had been given to defendant.

Upon these grounds the trial court was justified in striking out the portion of the answer now under consideration, especially in view of the discretionary nature of its action in a matter such as this. *Haug v. Haugan*, 51 Minn. 558, 53 N. W. 874.

Order affirmed.

On December 5, 1919, the following opinion was filed:

PER CURIAM.

One of the grounds for the order granting the motion to strike out the paragraph of the answer pleading the assignment was that renewal commissions are no part of the damages pleaded.

Whether this conclusion was correct was discussed in the briefs and oral argument. Nothing contained in the opinion filed herein is to be taken as deciding the question. We intended merely to indicate that it is a doubtful question and to leave it open for decision upon the facts developed at the trial.

Motion for rehearing denied.

GRANT D. SPICER AND E. D. SPICER, DOING BUSINESS AS
SPICER'S LAUNDRY v. H. D. KENNEDY.¹

November 14, 1919.

No. 21,471.

Notice of appeal from justice court.

1. Unless the notice of appeal from a judgment rendered by a jus-

¹Reported in 174 N. W. 321.

tice of the peace states upon which one of the two allowable grounds it is taken, no jurisdiction is acquired by the appellate court, and the latter has no power to amend the notice.

Entry of judgment when appeal is dismissed.

2. The statute, however, expressly authorizes, but does not require, the appellate court to enter judgment affirming the judgment of the justice court where, for any cause, the appeal is dismissed.

Special appearance.

3. By asking for that only which the statute authorizes the court to grant on a dismissal for lack of jurisdiction, there was no general appearance, nor was there such appearance by the admission of service of plaintiffs' notice of motion to amend the notice of appeal and by opposing the granting of the motion.

From a judgment of justice court against plaintiffs for \$99.67, they appealed to the municipal court of St. Paul. Defendant's motion to dismiss the appeal and for affirmance of the judgment of the justice court for the reasons that the notice of appeal failed to state the ground upon which the appeal was taken, whether on questions of law alone or upon questions of law and fact, was granted, and plaintiffs' motion to be allowed to amend the notice of appeal so that the same should read "law and fact," was denied, Boerner, J. Plaintiffs' motion to vacate the order granting defendant's motion and to relieve plaintiffs of the mistake in the notice of appeal, was denied. From the judgment entered pursuant to the order for judgment, plaintiffs appealed. Affirmed.

F. E. Baker, for appellants.

F. V. Innskeep, for respondent.

HOLT, J.

Appeals from judgments rendered by justices of the peace in the city of St. Paul are made to the municipal court of that city, but the procedure in respect to the notice of appeal and contents thereof is governed by section 7602, G. S. 1913. Plaintiffs attempted to take such appeal. It was dismissed by the municipal court and the judgment of the justice affirmed, because the notice failed to state the ground of appeal.

Due service of a proper notice of appeal is essential to give the appellate court jurisdiction. The section referred to requires the notice to give one

of two grounds of appeal, viz.: "That the appeal is taken upon questions of law alone, or upon questions of both law and fact." It has been held that the requirement is mandatory, and that a notice omitting to state the ground of appeal confers no jurisdiction. *Smith v. Kistler*, 84 Minn. 102, 86 N. W. 876; *Buie v. Great Northern Ry. Co.* 94 Minn. 405, 103 N. W. 11.

The original notice served has been returned to this court. It is upon a printed blank and the last line thereof, above the date and signature, contains these words in print: "And that said appeal is taken upon questions of," and the remainder of the line, being a little more than one-half thereof, is blank; evidently so left for the purpose of filling in one or the other of the two grounds upon which the appeal must be taken. Immediately below the blank space of the line are in print, inclosed in parenthesis, the words "law or law and fact." It is plain that these words were so placed by the one who prepared the blank form, to call the attention of the user thereof to the fact that it was necessary to insert one or the other of the grounds in the blank space provided in the line above. It is out of the question to consider the words in parenthesis a part of the notice. But, even if it could be done, appellants would not be helped, for, as held in *Smith v. Kistler*, *supra*, the purpose of the statute in stating the ground of appeal was to advise the other party upon which one of the alternative grounds the appeal was to be disposed of, and in this notice, if read as appellants make it appear in the "paper book," no one could tell upon which of the two grounds the appeal was taken.

The notice being ineffectual to confer jurisdiction, it follows that plaintiffs' application to the municipal court to amend the same could not be entertained. The documents necessary to perfect an appeal from a justice court must show on their face a compliance with the statute within the time allowed for appeal. After the time has expired nothing can be done to remedy a defect in such documents. *Grimes v. Fall*, 81 Minn. 225, 83 N. W. 835. In other words, the appellate court lacks power to amend the record transmitted by the justice so as to give itself jurisdiction. But if the record transmitted once confers jurisdiction upon the appellate court, then that court may relieve on account of excusable mistakes or defaults occurring after the appeal is perfected. Such was the

case in *Wentworth v. National Live Stock Ins. Co.* 110 Minn. 107, 124 N. W. 977, cited by appellant.

It cannot be held that, by joining with the motion for a dismissal a request for an affirmance of the judgment of the justice court, or by the admission of service of the notice of plaintiffs' motion to amend the notice of appeal and opposing the granting thereof, there was a general appearance or a consent to try the merits of the case in the municipal court. It is perfectly apparent that the request to affirm was made upon the sole ground that, since the notice of appeal failed to confer jurisdiction upon the municipal court, the dismissal of the appeal brought into operation the power to affirm expressly given the appellate court in such case by section 7611, G. S. 1913. The request for affirmance under this section was therefore not inconsistent with the claim of want of jurisdiction, and the case is not within the rule referred to in *Spencer v. Court of Honor*, 120 Minn. 422, 139 N. W. 815. It may be that, as the section now reads, the affirmance is not mandatory, but it certainly is authorized. *State v. Long*, 103 Minn. 29, 114 N. W. 248; *Holmes v. Igo*, 110 Minn. 133, 124 N. W. 974. Asking for only what the statute authorizes upon dismissal should not be construed into a general appearance or a consent to try a cause not properly in court. Nor should a party be held to have made a general appearance or to have conferred jurisdiction by simply admitting service of a notice of motion in a cause. And especially should it not be so held here, where defendant at once served the notice of motion for a dismissal solely on the ground that the municipal court was without jurisdiction of the cause. This motion was noticed for hearing at the time and place that plaintiffs had noticed for the hearing of theirs. Under these circumstances the appearance to oppose plaintiffs' motion should not be regarded as anything but a persistent objection to jurisdiction and not as a consent to try the cause anew in the municipal court.

It is regrettable that no relief can be granted plaintiffs against the errors of the justice court which resulted no doubt in an unjust judgment. But since the defective notice of appeal required a dismissal of the appeal, and the statute authorizes the appellate court to affirm the judgment of the justice court when an appeal is for any cause dismissed, we

find no legal ground for reversing the action of the municipal court in entering such judgment.

The judgment is affirmed.

HALLAM, J. (dissenting).

The conduct of the justice in dismissing a complaint for failure to reply is indefensible and it seems to me his ruling may be reviewed.

The defect in the notice of appeal is one that might be waived by a general appearance in municipal court. *Wrolson v. Anderson*, 53 Minn. 508, 55 N. W. 597.

It seems to me the defendant made a general appearance. The following principles are well settled:

An appearance for any other purpose than to question the jurisdiction of the court is general. *St. Louis Car Co. v. Stillwater St. Ry. Co.* 53 Minn. 129, 54 N. W. 1064.

An appearance for this special purpose, coupled with a demand for relief inconsistent with a claim of want of jurisdiction, is a general appearance. *Spencer v. Court of Honor*, 120 Minn. 422, 426, 139 N. W. 815.

Objection to the jurisdiction, coupled with objections which do not go to the jurisdiction, constitutes general appearance. *Papke v. Papke*, 30 Minn. 260, 15 N. W. 117.

In this case defendant asked for an affirmance of the judgment. This was relief which the court on motion to dismiss might give, but which it was not required to give. *State v. Long*, 103 Minn. 29, 114 N. W. 248; *Holmes v. Igo*, 110 Minn. 133, 124 N. W. 974. Defendant also appeared in opposition to plaintiffs' motion to amend the notice of appeal. Later he admitted due service of a notice of motion to vacate the order affirming the judgment on the ground that the judgment of the justice was void, and asking that defendant be restrained from proceeding further in the action, and on the return day of the motion appeared in opposition thereto.

It seems to me that defendant made a general appearance and that the defects in the notice of appeal were waived.

ALFRED HOLMQUIST v. CURTIS LUMBER AND MILL WORK
COMPANY AND ANOTHER.¹

November 21, 1919.

No. 21,893.

Facts.

1. Plaintiff, while in the employ of one of defendants, was injured by the negligence of a third party. The injury was one for which his employer was liable to make compensation under the compensation act, but plaintiff sued the third party, and recovered in settlement more than the compensation allowed by the compensation act. Plaintiff also held a benefit certificate issued by defendants' benefit department, and now sues for benefits under that certificate.

Workmen's Compensation Act — no liability under defendants' benefit certificate.

2. Plaintiff's contract with defendants' benefit department entitled him to benefits in event of death or disability, for which compensation or damages are not required by law to be paid by his employer. This being a case in which liability of the employer arose under the compensation act, liability under the benefit certificate does not arise.

Same — payment of damages by third party.

3. The fact that the payment of damages by the railroad company discharged the liability of the employer does not give rise to liability under the benefit certificate.

Action in the district court for Hennepin county to recover \$849.28 upon a benefit certificate issued by defendants' benefit department. The case was tried before Fish, J., who made findings and ordered judgment in favor of plaintiff for \$800. Defendants' motion to amend the findings of fact and conclusions of law and their motion for a new trial was denied. From the order denying their motion for a new trial, defendants appealed. Reversed.

George T. Simpson, John F. Dahl and H. V. Mercer, for appellants.

John M. Nelson and T. J. Stevenson, for respondent.

¹Reported in 175 N. W. 103.

HALLAM, J.

1. Plaintiff, while in the employ of defendant, Curtis-Yale-Howard Company, was injured by the negligence of the Omaha Railway Company. The injury was one for which his employer was liable to make compensation under the compensation act. Plaintiff sued the railway company, and, by compromise, secured in settlement of his claim, \$4,750, which was more than the compensation for which his employer was liable under the compensation act. He now brings this action to recover under a benefit certificate issued to him by the benefit department of the defendant Curtis Lumber and Mill Work Company, of which the Curtis-Yale-Howard Company is a subsidiary. The trial court commenced the trial with a jury. At the close of the testimony, the court, observing that the case presented only questions of law, discharged the jury, and later directed judgment for plaintiff. Defendant appeals.

Plaintiff's claim is contractual and his right to recover naturally depends on the terms of his contract. The trial court remarked that the decision gave plaintiff double reimbursement for his injury, and that this was a "bit unfair," but considered that the contract called for insurance and contemplated double compensation in such a case as this. Plaintiff paid the dues required by his contract and is entitled to all that his contract allows. If it is a contract of insurance, plaintiff is entitled to the amount claimed, *State v. District Court of St. Louis County*, 134 Minn. 28, 158 N. W. 791, Ann. Cas. 1918B, 635, and his demand is not a "bit unfair." On the other hand, the fact that he has paid for benefits in defendants' benefit department does not entitle him to any benefits other than those for which his contract provides.

2. Defendants' benefit department and the rights of its members, including plaintiff, are governed by certain "rules and regulations" which are part of the contract between the parties. These rules and regulations contain the following provisions:

Article II provides: "The objects of this department are to provide for the payment of benefits upon the death or disability of a contributing employee in all cases in which compensation or damages are not payable by the signatory company employing him."

Article VIII, section 1, provides: "The benefits of membership in this department in event of death or disability to compensate for which

no payment is required by law to be made or is in fact made by any signatory company shall be," and then follow provisions for benefits allowed for death and various forms of disability.

Article X, section 5, provides: "No benefit shall in any case be payable for death or disability for which the employee or his dependents or next of kin shall make claim against any signatory company to compensation, indemnity or damages or receive any sum from a signatory company, or on its behalf, or from any company, association, or fund insuring or securing such payment, as or on account of compensation, indemnity or damages for such death or disability."

Plaintiff and defendants are subject to the Workmen's Compensation Act. The benefit department was organized, and its rules and regulations adopted, after the compensation law had been passed and before it went into effect. The operation of the department under the compensation act was contemplated and the use of the term "compensation" in the sections above quoted no doubt has reference to the compensation provided by the statute.

The language of article II, and of section 1, article VIII, seems to us decisive of this case. The former section explicitly states the object of the department to be the payment of benefits in "cases in which compensation or damages are not payable by the signatory company," and the latter section provides that benefits shall be paid to compensate for death or disability "for which no payment is required by law to be made * * * by any signatory company." Nowhere is there any provision for payment of benefits in any case where the employer is liable, either to common law damages or to statutory compensation. In other words, the plan is not one of absolute insurance, but one providing for cases in which the law does not provide for damages or compensation to be made by the employer, such, for example, as injuries received without negligence and not received in the course of employment or arising out of it. The injury received by plaintiff being one for which his employer was required by law to make compensation, the case seems clearly excluded from the contract with the benefit department.

The only difficulty in the case arises from the fact that the injury was caused by the negligence of a third party, namely, the railway company, and that plaintiff received damages from the railway company in excess

of the compensation defendant employer was required by law to pay, and that under section 8229 this payment by the railway company relieved defendant employer of its liability to pay the compensation it would otherwise have been required to pay. We are of the opinion that these facts do not give rise to liability under the contract with the benefit department.

As soon as the injury had occurred, there arose an obligation on the part of defendant to make compensation under the Compensation Act. Compensation was "payable," payment was "required by law to be made," and from that fact it followed that there was no claim to benefits under defendants' benefit department. Under section 8229 it was optional with plaintiff to assert his claim against the employer defendant or against the railway company, and he chose to pursue the railway company. But his pursuit of the railway company did not create any new right against the defendants or their benefit department. It simply operated to discharge the liability of the employer defendant under the compensation statute. In our opinion the injury received by plaintiff was one for which defendant employer was required by law to pay compensation, as those words are used in the provisions of the rules and regulations above quoted and that no claim existed against the benefit department on account thereof. Reversed.

MICHAEL DEFIEL v. JONAS ROSENBERG.¹

November 21, 1919.

No. 21,394.

Contract — rescission for fraud after part performance.

1. A person who has been induced to enter into an executory contract by fraud, upon a discovery of the fraud, the contract then being only partly performed, may disaffirm and rescind as to future performance, retaining the right to be restored to his former position by way of damages or other appropriate relief.

Same — no damages after affirmance.

2. He cannot elect to affirm the contract, go forward with the performance thereof, and claim damages to accrue therefrom in the future.

¹Reported in 174 N. W. 838.

Two actions in the district court for Hennepin county to recover instalments of rent aggregating \$1,500. The allegations of the answer are stated in the second, fourth, and fifth paragraphs of the opinion. The cases were consolidated and tried together before Fish, J., who at the opening of the trial granted plaintiff's motion for judgment on the pleadings, plaintiff objecting to the introduction of any testimony on behalf of defendant under his allegations in his counterclaims. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed.

Robert S. Kolliner and Rose & Brill, for appellant.

Herbert P. Keller and Bruce J. Broady, for respondent.

BROWN, C. J.

In February, 1916, by written contract, plaintiff leased to defendant certain premises situated in the city of St. Paul for the term of 99 years at the annual rental of \$3,000 payable quarterly. Defendant entered into possession of the premises and thereafter made all quarterly payments of rent as they became due until March, 1918, when he defaulted. This action was brought to recover the instalment of rent then due. Defendant again defaulted in the payment of the instalment which fell due on June 1, 1918, and plaintiff brought a second action to recover the same. At the trial the actions were consolidated and tried as one.

Defendant alleged in defense and as a counterclaim that he was induced to enter into the contract by certain alleged false and fraudulent representations made by plaintiff at the time of the transaction, the falsity of which, according to the allegations of the answer, will cause a loss and damage to him in the sum of \$1,100 annually during the period of the lease; a grand total of \$108,900, for which he demands judgment against plaintiff. Defendant did not rescind the contract for the alleged fraud, upon a discovery thereof, but retained, and, so far as the pleadings disclose, still retains the possession of the leased premises.

At the opening of the trial the court granted plaintiff's motion for judgment on the pleadings, on the ground that the answer stated neither a defense nor valid counterclaim. Judgment was so entered and defendant appealed.

Defendant leased the premises, an apartment house, for the purpose

of subletting the various rooms therein to third persons, and agreed to pay the stated annual rental. The answer alleges that he was induced to enter into the contract by certain false and fraudulent representations, the falsity of which he alleges will cause the damage claimed. It alleges that plaintiff falsely represented that the cost and expense of heating the premises did not exceed the sum of \$360 per year, and that the incidental expense of light, water and repairs did not exceed \$100 per year; that the janitor service could be procured and had for \$180 per year; that such representations were false and untrue, for the items of expense referred to greatly exceeded the amounts stated. The answer also alleges that plaintiff falsely represented that the several apartments were at the time occupied by responsible tenants who paid their rent in advance; that the representation was untrue, for a number of tenants were then in arrears and in default. It alleges that plaintiff fraudulently concealed the fact that some of the apartments were furnished by him, a fact defendant claims was important for him to know in entering into the contract; that one of such furnished apartments was held in reserve for a man of wealth who occupied it occasionally for immoral purposes, which fact was not disclosed. The answer also alleges that plaintiff falsely represented that the annual income from the rents was not less than \$3,300 per year, which, if true, would leave a net profit to defendant in the sum of \$300, and that the representation was untrue, for there was and would be to defendant an annual loss of \$1,100, instead of a profit of \$300.

The answer also alleges that defendant relied upon and was induced to enter into the contract by the representations stated, and that by reason of other engagements he did not discover the fraud so perpetrated until "several months prior to the commencement of the action;" that he offered to rescind the contract but that plaintiff declined the offer, but there is no allegation that defendant rescinded in fact by returning the premises to plaintiff or otherwise; on the contrary, his answer proceeds on the theory that he may retain the possession of the premises under the lease and recover the damages claimed.

The rights of a person who has been induced to enter into a contract by fraud or fraudulent representations are well settled and require no extended statement or discussion. As to executed contracts, those that

have been fully performed by both parties, the defrauded party, upon discovery of the fraud, may elect to rescind the contract and demand to be placed in statu quo, or he may affirm, for the contract in such case is only voidable, and recover the damage caused by and resulting from the fraud. *Haven v. Neal*, 43 Minn. 315, 45 N. W. 612. Where, at the time of the discovery of the fraud or the facts disclosing it, the contract is yet wholly executory, the defrauded party, under our decisions, whatever may be the rule elsewhere, has but one remedy, namely, prompt rescission and disaffirmance. *Encyclopedia Press, Inc. v. Harris*, 140 Minn. 145, 167 N. W. 363. He cannot in such case elect to affirm or stand by the contract and recover damages for the fraud, for by continuing the contract, knowing the fraud, his injury would be self-inflicted. *Thompson v. Libby*, 36 Minn. 287, 31 N. W. 52; 2 *Notes on Minn. Reports* 981.

In the case at bar the contract, at the time the fraud was discovered, had been partly performed. Defendant had taken possession of the leased premises and paid the stipulated rent for a year and a half before he discovered that he had been defrauded. But the part of the contract then in fact performed was a mere trifle of the whole, for the lease then had nearly a hundred years to run. In a situation of that kind, we think the rule last stated, namely, that as to rights arising under a contract, yet wholly executory when the fraud is discovered, should apply by analogy to the partly performed executory contract. In a case of that kind the defrauded party should be required, as to the future operation of the contract, which may be treated as severable from that which has been performed, promptly to rescind, retaining the right to be restored to his former position by way of damages or other appropriate relief. He should not be permitted to treat the contract as subsisting and go forward with the performance thereof, notwithstanding the fraud, and be entitled to damages to accrue from such future performance, thus to speculate upon the fraud and be the instrument of his own loss. *Thompson v. Libby*, supra.

There is high authority for the proposition that, even in the case of the partly performed executory contract, the remedy of prompt rescission and disaffirmance is exclusive, and, where there is no such rescission, no damages for the fraud can be had, the fraud being waived. Si-

mon v. Goodyear Metallic Rubber Shoe Co. 105 Fed. 573, 44 C. C. A. 612, 52 L.R.A. 745; Kingman & Co. v. Stoddard, 85 Fed. 740, 29 C. C. A. 413. Such was the result, though the point was not, perhaps, expressly so decided in Bell v. Baker, 43 Minn. 86, 44 N. W. 676. But we prefer the rule which requires prompt rescission as to the unperformed part of the contract, and we adopt it as appropriate and equitable in such cases, affording, as it will, full and adequate relief.

Humphrey v. Sievers, 137 Minn. 373, 163 N. W. 737, is different from this case in its facts and did not involve damages to accrue from future performance of the fraudulent contract.

We do not stop to consider the various elements of damages set forth and alleged in defendant's answer. It is sufficient to say that for any actionable fraud therein alleged defendant may recover to the extent stated. Nor is it necessary or proper to discuss the question as to when defendant discovered the fraud; the pleadings make it an issue of fact. Judgment reversed.

ROYAL LARES v. CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY AND ANOTHER.¹

November 21, 1919.

No. 21,443.

Railway — fire caused by negligence — uncertainty as to cause — verdict.

1. Where the evidence as to the origin of a fire alleged to have been negligently started points with substantially the same force to two or more independent sources, a jury should not be permitted to speculate as to which was in fact responsible.

Same — no question for jury.

2. The evidence is *held* insufficient to require a submission of the question to the jury in this case.

Action in the district court for Washington county to recover \$9,250 for the loss of plaintiff's house by fire from one of defendant's locomotives. The case was tried before Searles, J., who at the close of the evi-

¹Reported in 174 N. W. 834.

dence granted defendant's motion for a directed verdict. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

H. A. Loughran and Reuben G. Thoreen, for appellant.

Barrows, Stewart & Metcalf, for respondent.

BROWN, C. J.

This action was brought to recover damages for the destruction of plaintiff's dwelling house by a fire alleged to have been negligently started by defendant railroad company and its engineer. A verdict was directed for defendant on the trial, and plaintiff appealed from an order denying a new trial.

The facts, which are not in substantial dispute, are as follows: The line of defendant's railroad extends from the city of St. Paul in approximately a southerly direction to and beyond the village of St. Paul Park, in Washington county, this state. In addition to its through trains to Chicago and other points, the company operates a local train, referred to in the record as the Burlington Motor, from suburban points to the city of St. Paul, carrying laborers and others whose daily occupations require their presence in the city. The Chicago, Milwaukee & St. Paul Railroad Company also operates its passenger trains into St. Paul, over this line of road from a short distance south of the point here in question. Plaintiff's residence, which was destroyed by fire on the early morning of January 25, 1918, was on the west side of the right of way and some 50 feet from the railroad track. It was occupied by plaintiff with his wife and three children. Plaintiff was a contractor and his place of business was in the city of St. Paul, making daily trips thereto on the Burlington Motor. On the morning of the date above given he arose early, starting a fire in the kitchen stove and also in a heater in another room. He made his own breakfast, and then set the stoves in order and left the house to catch the motor train which left Pullman station at about 7:30 o'clock. His wife and children were then asleep. The train passed the house and he noticed nothing unusual nor anything to indicate that a fire was within or about the same. Less than ten minutes later the house was discovered on fire by neighbors, and it had gained such headway when they reached the scene soon thereafter that entrance

into the building was prevented by fire and smoke. The wife and children were consumed.

It further appears that the building was a frame structure, but covered with iron sheeting, both upon the sides and roof. An inclosure had been made on the northeast corner of the building, with a view of enlarging the kitchen, but without a roof, inside of which the walls of the building proper were covered with tar paper. The ground was covered with some six or more inches of snow at the time, and the thermometer registered 20 degrees below zero. There was no evidence that any sparks escaped from or were scattered by the engine of the train, further than might be assumed from the fact that the train was going upgrade, the engine working hard and emitting volumes of black smoke, as is usual in such conditions. A Chicago, Milwaukee & St. Paul train passed the premises over the Burlington track two or three minutes preceding the motor train. That was a heavy through passenger train from Chicago, and necessarily the engine thereof emitted the same volume of black smoke, and possibly sparks or live cinders, precisely as might have been emitted by the motor train engine. Neighbors were at the burning building within 15 minutes after plaintiff left the same to catch the motor train, and the evidence given by them, and the condition of the fire as they found it, would indicate, at least justify, the inference that it started from within the house and not in the inclosure heretofore described. The wind at the time was from the northwest, with a natural tendency to carry sparks from a passing train away from the building, and the evidence is that the debris from the burnt building was to the southeast.

It is plaintiff's claim that the evidence would have justified the jury in finding that sparks or live cinders were emitted and scattered by the motor train engine, and were carried by the whirling wind into the inclosure referred to, which was without a roof, there ignited the tar paper on the walls of the building proper, from which the fire worked its way into the building and consumed it.

We concur in the view of the trial court that the evidence leaves the origin of the fire wholly to conjecture and speculation, and therefore insufficient to justify a verdict against defendant. In our view of the evidence there is as much basis for charging the cause of the fire to the Milwaukee train, which passed over the line two minutes ahead of the

motor train, and under substantially the same conditions, as to defendant's train. It also seems clear that a fair doubt is presented by the evidence whether the fire was caused by either train, for conditions described by the witnesses first on the scene indicate that it originated within and not from without the building.

In this situation of the evidence the court was right in holding as a matter of law that plaintiff had failed to establish his alleged cause of action; the evidence as a whole leaves the origin of the fire in such doubt and uncertainty that a verdict in plaintiff's favor could not be sustained. *Minneapolis Sash & Door Co. v. Great Northern Ry. Co.* 83 Minn. 370, 375, 86 N. W. 451; *Swenson v. Erlandson*, 86 Minn. 263, 90 N. W. 534; *Brennan Lumber Co. v. Great Northern Ry. Co.* 80 Minn. 205, 83 N. W. 137. While in cases of this kind circumstantial evidence is sufficient to take an issue of the kind to the jury, yet, where the evidence points with substantially the same force to two or more independent sources as the origin of the fire, a jury should not be permitted to speculate as to which was in fact responsible.

Order affirmed.

CHARLES F. MOGLE v. A. W. SCOTT COMPANY AND
ANOTHER.¹

November 21, 1919.

No. 21,446.

Master not liable for negligent use of automobile by servant for pleasure.

1. This court sanctions the doctrine that the head of a family, who provides for the recreation of the members of his family by furnishing an automobile for their use and pleasure, is responsible for its negligent use by any one of the family having his permission to drive it. The doctrine is a development of the rules applicable to the relation of master and servant and principal and agent and is not to be extended to cases where an employer permits a favored employee to use, for his own pleasure, an automobile kept and ordinarily used in carrying on the employer's business.

¹Reported in 174 N. W. 832.

Same.

2. An employer is not liable for the negligence of his employee who took his automobile to drive out to a park with his family on a holiday when his time did not belong to his employer and negligently ran down and injured a person at a street intersection, even though he had his employer's permission to take the automobile.

Action in the district court for Hennepin county to recover \$3,318 for injuries received from an automobile of defendant company driven by its servant. The separate answer of defendant company alleged that plaintiff and the Minneapolis Street Railway Company were subject to the provisions of the Workmen's Compensation Act; that if the injuries were caused solely by defendant's negligence and were caused under circumstances that created negligence or liability on the part of defendant for damages, plaintiff had no right to recover from defendant any damages whatsoever except those provided in the compensation act, and had no right to have the amount of such compensation determined by any method other than that provided in the act. The case was tried before Fish, J., who at the close of the testimony granted defendant company's motion for a directed verdict in its favor, on the ground that the testimony shows that the car was not being used in the course of the servant's employment and for the uses and purposes for which the automobile was kept by defendant. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

R. H. Fryberger, for appellant.

Kingman, Cross & Cant, for respondent company.

LEES, C.

Action to recover for personal injuries caused by the negligence of the defendant Sobieski in operating an automobile owned by the defendant A. W. Scott Company.

On July 4, 1917, Sobieski, at the direction of J. Walter Scott, the managing officer of the A. W. Scott Company, took an automobile owned by the company to drive from Minneapolis to Wayzata, where he was to do some work for Scott. When the work was finished Scott directed him to drive the car back to Minneapolis and put it in the company's building where it was kept and to which Sobieski had a key. On his return,

Sobieski stopped at his house for a noonday dinner and was importuned by his wife to take the car and drive to Minnehaha Park with her and her mother. He at first refused to do so, on the ground that Scott had directed him to take the car back to the place where it was kept. However, he finally yielded to his wife's persuasion, and on the trip to the park negligently ran down and injured the plaintiff. He and the company were joined as defendants.

It was alleged in the complaint that at the time and place of plaintiff's injury, Sobieski was a servant of the Scott Company and in the course and scope of his employment, with full knowledge, permission and acquiescence of the company, was using the automobile in the performance of the purpose and uses for which it was intended and kept.

At the trial plaintiff called a witness by whom he sought to prove that on August 8, 1917, in the course of a conversation with Scott concerning insurance of the automobile, Scott said that Sobieski was given more privileges than other employees of the company and had full charge of the car, and that only occasionally would any of the others run it in the business and never for pleasure, but Sobieski was allowed to use it and frequently took it for the purpose of driving with his family on Sundays and in the evening, and that he was a reliable, careful driver. An objection to the offer was sustained, the court stating that under the allegations of the complaint, insofar as the company was concerned, plaintiff was confined to proof that Sobieski was using the car in its business and in the course and scope of his employment, otherwise there could be no recovery against it, and that the evidence failed to show that at the time of the accident Sobieski was using the car in the business of the company or within the scope or course of his employment. A verdict in its favor was directed. This appeal is from an order denying a new trial.

This court sanctions the doctrine that the head of a family, who provides for the recreation of the members of his family by furnishing an automobile for their use and pleasure, is responsible for its negligent use by any one of the family having his permission to drive it. The most recent expressions of the court on the subject may be found in *Johnson v. Smith*, 143 Minn. 350, 173 N. W. 675, and *Plasch v. Fass*, supra, page 44, 174 N. W. 438. The doctrine is a development of the rules applicable to the relation of master and servant and principal and agent, which have

been extended to meet a new situation brought about by the invention of the automobile and its common use, with the owner's permission, by the members of his family for whom he has provided it. As was said in *Kayser v. Van Neest*, 125 Minn. 277, 146 N. W. 1091, 51 L.R.A. (N.S.) 970, a man may properly make it an element of his business to provide pleasures for his family; or, as it was put in *Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631, the use of an automobile, for the purpose of furnishing the members of the owner's family with outdoor recreation, is within the scope of the business of the head of a family analogously to the furnishing of food and clothing or ministering to their health.

We are now asked to extend the doctrine to cases where an employer permits a favored employee to use, for his own pleasure, an automobile kept and ordinarily used in carrying on the employer's business. The request is put upon the ground that, through the medium of automobiles, employers may properly provide "fresh air and pleasures, during their leisure hours, as necessities for their laboring men," and that in so doing they occupy the same position as the head of a family in similarly providing his wife and children with pleasures of that sort. If we were to hold as requested, it would tend to put an end to the praiseworthy custom of many employers who permit faithful employees to use occasionally, for their personal enjoyment, automobiles kept and ordinarily used in carrying on the employer's business. If this cannot be done, without subjecting the employer to liability for damages if his employee is negligent in operating the automobile, few employers will continue to follow the custom. But, aside from this particular consideration, we think both reason and authority are opposed to plaintiff's contention. The extension of the family automobile doctrine to other relationships cannot well be justified upon any principle of the law of master and servant or principal and agent. The owner of an automobile, who loans it to another to use for purposes personal to the borrower, is neither master nor principal, but merely a bailor, and in law is not chargeable with the consequences of the borrower's negligence while pursuing his own ends in his own way. It has been consistently held that an automobile is not a dangerous instrumentality, hence liability of the owner cannot be put upon that ground. *Provo v. Conrad*, 130 Minn. 412, 153 N. W. 753. To sustain plaintiff's contention would logically lead to holding the owner of any

kind of personal property responsible for the negligent use of his property by one to whom he loaned it.

Sina v. Carlson, 120 Minn. 283, 139 N. W. 601, is greatly relied upon by plaintiff, but is clearly distinguishable. In that case Olson, the employee, was a farm hand whose time belonged to Carlson, his employer. He was using a farm team for a purpose consented to by Carlson, in order to facilitate the performance of an errand of his own which he was permitted to take time to perform, and it was said that in so using the team he was in fact facilitating Carlson's business as well, and that the purpose was not a private one in which Carlson had no interest.

In the present case, Sobieski was not even using the automobile to facilitate the performance of a necessary errand of his own. When he was driving out to a park with his family on a holiday for his and their pleasure, his time did not belong to his employer, and hence by no stretch of the imagination can it be said that he was then facilitating any business of his employer.

The views we have expressed make it unnecessary to pass upon the other questions raised by the assignments of error. Plaintiff failed to establish a cause of action under any theory upon which he sought to attach liability to the Scott Company, and the court ruled correctly upon the offer of proof and in directing a verdict in favor of the Scott Company. Sobieski alone is liable to plaintiff.

For the purposes of the case, we have treated the complaint as broad enough to permit the introduction of evidence tending to show either the use of the automobile by Sobieski in the course and scope of his employment or its use with the permission of his employer for a purpose for which it was kept by the employer.

Order affirmed.

THOMAS M. DAIGLE v. SUMMIT MERCANTILE COMPANY
AND ANOTHER.¹

November 21, 1919.

No. 21,463.

Replevin — act of sheriff outside his county not an official act.

1. A sheriff, or his deputy, in serving a summons or attempting to take property in replevin proceedings in a county of which he is not an officer, acts in an individual and not an official capacity.

Deputy sheriff and his principal liable for assault.

2. Upon a consideration of the evidence, it is *held* to justify a jury in finding that a deputy sheriff, in committing an assault, was acting as the agent and in the furtherance of the business of the person for whom he was serving a summons, and in charging such person with liability therefor.

Charge to jury — punitive damages.

3. There was no error in instructing the jury that, in their discretion, they might award punitive damages as against both defendants.

Assault — verdict not excessive.

4. A verdict for \$1,250 in an action for damages for assault is not so excessive as to indicate passion and prejudice on the part of the jury, even though the physical injury to the plaintiff was not serious, there being credible testimony to the effect that he was the victim of an unprovoked attack on his own premises, in the course of which he was roughly handled in wanton disregard of his rights.

Joint verdict — defendant cannot complain, when.

5. Where no request for separate verdicts is made, either as to compensatory or punitive damages, a defendant who did not actively participate in the assault cannot complain because he was jointly held with his codefendant for the entire amount of damages awarded.

Action transferred to the district court for Beltrami county to recover \$5,000 for malicious assault. The case was tried before Stanton, J., who

¹Reported in 174 N. W. 830.

denied the motions of defendant company for a directed verdict, and a jury which returned a verdict for \$1,250. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, Summit Mercantile Company appealed. From an order denying his motion for a new trial, John Thompson appealed. Affirmed.

C. L. Pegelow, for appellants.

H. W. Stark, for respondent.

LEES, C.

The defendant Summit Mercantile Company held a chattel mortgage against the plaintiff. The defendant John Thompson was the president and general manager of the Mercantile Company. In December, 1915, the company began an action in the district court of Beltrami county to foreclose the mortgage, and, in connection therewith, instituted replevin proceedings to obtain possession of the mortgaged property. The sheriff of Beltrami county received the papers for service and turned them over to a deputy, one Simon Thompson. Accompanied by John Thompson, Simon Thompson went to plaintiff's house in Itasca county to serve the papers. While attempting to do so, Simon Thompson got into an altercation with plaintiff, which was followed by an assault upon him. This action was brought to recover damages from the company and John Thompson on account of the assault. The trial resulted in a verdict for plaintiff against both defendants. This appeal is from an order denying a new trial.

The first two assignments of error relate to rulings on the admission or exclusion of evidence. No exceptions to such rulings were taken at the trial, and the rulings were not assigned as error in the motion for a new trial, hence we cannot consider them on this appeal.

The company asked for a directed verdict at the conclusion of the evidence and excepted to a denial of its request. Its principal contention here is that the request should have been granted because Simon Thompson was not its agent at the time of the assault, and, even if he was, he was not acting within the scope of the agency or in the furtherance of the company's business. We do not sustain either contention. As deputy sheriff of Beltrami county, Thompson had no authority to serve a summons or take property under the replevin papers in Itasca county. As

an individual, he had a right to serve the summons there, but not to take the mortgaged property against the will of the plaintiff. In all that he did in these respects he was acting as the agent of the Mercantile Company and not as a public officer. The question, therefore, is whether there is evidence to sustain a finding by the jury that the assault took place under circumstances which make the company liable as principal for the acts of its agent.

The testimony of Daigle and his wife is to the effect that the Thompsons came to their house together, stating that they had papers to serve and requesting Daigle, who was in the house, to step outside; that, when he hesitated to do so, Simon Thompson seized him, dragged him out of the house, threw him on the ground, knelt on his body, and attempted to handcuff him; that in the struggle between them the handcuffs fell to the ground, were picked up by Mrs. Daigle, and, as she was running away with them, John Thompson followed her, demanding their return; that, after she had thrown them into the brush, she went back and seized Simon Thompson by the arm and attempted to pull him off her husband, but John Thompson drew her away and prevented her further interference; that, at her husband's request, she then ran into the house and got a gun, which John Thompson took away from her; that later on, after Daigle was allowed to get up, Simon Thompson started towards the barn where some of the mortgaged property was located; that Daigle told him not to take any of the property, but he continued to go on; that Daigle again called to his wife to bring the gun, and John Thompson again interfered; that Mrs. Daigle then blew a blast on a horn, summoning to the rescue her son, son-in-law and daughter, who were not far from the house, and that, after the arrival of these reinforcements, the Thompsons desisted from attempting to take the property and left the premises.

Much of the testimony of the Daigles was denied by the Thompsons, but they do admit going to Daigle's house to serve the summons and to take possession of the mortgaged property by virtue of the replevin papers, an attempt to obtain such possession, and a struggle between Daigle and Simon Thompson, in which the latter—a powerful man, weighing about 250 pounds—was the victor. They do not deny that John Thompson was present while the struggle was going on, took the gun away from

Mrs. Daigle, followed her when she took the handcuffs away and demanded that they be given to him, and in no way attempted to interfere with Simon Thompson's actions. We think a case for submission to the jury of the question of the company's liability for the acts of the Thompsons was clearly made out and that the verdict against it must be sustained. *Lesch v. Great North. Ry. Co.* 93 Minn. 435, 101 N. W. 965; *Slater v. Advance Thresher Co.* 97 Minn. 305, 107 N. W. 133, 5 L.R.A. (N.S.) 598; *Merrill v. Coates*, 101 Minn. 43, 111 N. W. 836; *Cressy v. Republic C. Co.* 108 Minn. 349, 122 N. W. 484; *Burnham v. Elk Laundry Co.* 121 Minn. 1, 139 N. W. 1069; *Nettle v. Flour City O. I. Works*, 126 Minn. 530, 148 N. W. 43; *Sunderland v. Northern Exp. Co.* 133 Minn. 158, 157 N. W. 1085, L.R.A. 1916E, 1151.

The court charged the jury that, in their discretion, they might award punitive damages. There was no error in this. If the jury believed the testimony of the Daigles, plaintiff was wantonly assaulted and there was a reckless disregard of his rights, which would permit the award of punitive damages as against the company. *Anderson v. International H. Co.* 104 Minn. 49, 116 N. W. 101; *Baumgartner v. Hodgdon*, 105 Minn. 22, 116 N. W. 1030; *Hammer v. Forde*, 125 Minn. 146, 145 N. W. 810; *Helppie v. N. W. Drainage Co.* 127 Minn. 360, 149 N. W. 461.

The verdict was for \$1,250 and it is urged that it is so excessive as to indicate passion and prejudice on the part of the jury. Daigle's physical injuries do not appear to have been serious, but, according to his testimony, he was the victim of an unprovoked attack in his own house. He was roughly handled. The invasion of his home and the indignities to which he was subjected, probably account for the size of the verdict. It could be sustained more readily if it had been for a smaller amount. The trial court approved of it, and we are unable to hold that there was abuse of discretion in permitting it to stand. *Gibson v. Chicago G. W. R. Co.* 117 Minn. 143, 134 N. W. 516.

Defendant John Thompson, though not actively engaged in the assault, was nevertheless a party to Simon Thompson's acts, to such an extent that the jury may well have found that he too was liable. He did not request that separate verdicts should be returned, either as to compensatory or punitive damages, and cannot now complain of the verdict

against him and his codefendant jointly. *Muenkel v. Muenkel*, 143 Minn. 29, 173 N. W. 184.

Order affirmed.

FRANK L. WALSH v. AMY A. WALSH AND OTHERS.¹

November 21, 1919.

No. 21,468.

Cancellation of deed — dismissal of action equitable.

A mother conveyed a tract of land to her son in consideration of his verbal promise to support her. The son faithfully performed his promise until his death 23 years later. His widow had no knowledge of the agreement and provided no support for the mother after his death, and was never asked to do so. Five years later the mother brought suit to cancel the conveyance for failure to furnish support, but died before it came to trial and her executor was substituted as plaintiff. *Held*, that, in view of the circumstances disclosed by the record, a cancellation of the conveyance would be inequitable and will not be decreed; *held* further that neither the pleadings nor the evidence furnish a basis for any other relief and that the court correctly dismissed the action.

Action in the district court for Hennepin county to cancel plaintiff's deed. The case was tried before Molyneaux, J., who made findings and as conclusion of law dismissed the action. Plaintiff's motion for an order amending the conclusions of law or for a new trial, was denied. From the judgment dismissing the action, plaintiff appealed. *Affirmed*.

Benjamin Drake, N. E. Pardee and P. L. Solether, for appellant.

W. L. Hursh and William B. McIntyre, for respondents.

TAYLOR, C.

This is an action to annul a conveyance of land made in 1887 by Mary A. Walsh to her son Burke E. Walsh, in consideration of his verbal promise to support her during the remainder of her life. The court rendered judgment dismissing the action, and the executor of her last will and testament appeals.

¹Reported in 174 N. W. 835.

Edward F. Walsh died intestate in 1883 possessed of a farm in Henepin county consisting of two forties known as the "north eighty," another known as the "west forty" used mainly for pasturage, and another known as the "home forty." There was also a small fraction of less than two acres adjoining the "home forty" and practically treated as a part of it. The farm buildings were located on the "home forty" which with the "west forty" constituted the homestead. At the death of Mr. Walsh the title to the farm passed to his widow, Mary A. Walsh, and to his three sons and three daughters, all of whom were of age except the youngest son. Shortly after their father's death, the five adult children conveyed all their interest in the farm to their mother by deed dated July 24, 1883. The three daughters and the second son married and established homes for themselves. The mother with the oldest son, Burke, and the youngest son, Frank, remained on the farm and continued to operate it, the mother doing the housework, and Burke, with such assistance as Frank was able to render, doing the farm work. There had been some sort of an understanding in the father's lifetime that each boy should eventually have 40 acres of the farm.

In 1887 the children formed the impression that an old gentleman, whose name is not given in the record, was paying attention to their mother with a view of marriage, and that the farm was the inducement which led to these attentions. With this in mind they urged the mother to divide the farm between the boys and as the result of several family conferences she executed three deeds. The daughters seem to have been the most suspicious of the old gentleman and to have taken the most active part in bringing about the execution of these deeds. By one of these deeds, the mother conveyed to her second son, James D., the undivided one-half of the "north eighty." By the second deed she conveyed to her minor son, Frank L., all her remaining interest in this 80 which, with the interest which he had inherited from his father, gave Frank the undivided one-half thereof not conveyed to James D. By the third deed, she conveyed to her oldest son, Burke, the undivided five-sixths of the homestead, consisting of the "west forty" and the "home forty," saving and reserving to herself, however, her life estate in the "home forty." The other one-sixth of the homestead was held by Frank,

subject to his mother's life estate therein. Subsequently Frank and James made a partition of the "north eighty" between themselves.

After the making of the above deeds, the mother, Burke and Frank remained in the old home and farmed the homestead and Frank's forty the same as before. This continued until 1901, a period of 14 years. They derived their support, or the principal part of it, from the farm. The proceeds of the products sold went into a common fund from which the household expenses were paid and the needs of all three supplied. For a time the mother seems to have taken an important part in the management of affairs and to have handled the common fund, but she gradually relinquished the management of the farm and the handling of the funds to Burke. In 1901, Burke, who had previously married, completed a new house on the "home forty" near the old house, and from that time until his death resided therein with his wife and family. Frank and his mother continued to reside in the old house. From this time on Frank and Burke, while working together much as before, kept their financial affairs separate, in part at least, Frank taking the proceeds of his forty and Burke the proceeds of the homestead. Both contributed to the support of the mother. In 1910 Burke died and immediately thereafter his wife with her two children removed to the home of her parents where she has ever since resided. Frank and his mother continued in the old home. One of the daughters and her invalid husband came to reside with them, so that the daughter could care for both her mother and her invalid husband. The new house has remained unoccupied, except as Frank has used it for the storage of farm products. After the death of Burke, Frank farmed his own forty and the "home forty," and with the aid of his sister cared for and supported his mother until her death.

During the lifetime of Burke the best of relations seem to have existed between him and his mother, and it is undisputed that he provided for her wants to the extent of his ability. After his death the relations between his brother Frank and his mother and sisters on one side and his widow on the other seem to have become strained, and in April, 1915, his mother brought this action against his widow and minor children, who were his sole heirs at law, to set aside and annul the conveyance made by her of the "home forty" and adjoining fraction, on the ground that the con-

veyance to him of this land had been made in consideration of an agreement on his part to support her during her natural life, and that this agreement had not been performed. She died before the action came to trial and her son Frank, as executor of her will, was substituted as plaintiff.

The court found as a fact that the mother executed the three deeds in reliance upon an agreement by Burke to support her during her life, and we think the evidence is sufficient to sustain this finding.

The court also found as a fact that Burke had faithfully performed his agreement up to the time of his death, and we are of the opinion that this finding is also sustained by the evidence.

The court also found as a fact that after Burke's death his wife, Amy A. Walsh, and his children, Russell E. and Edmund Walsh, the defendants in this action, never contributed anything toward the support of his mother, Mary A. Walsh, but further found that these children were respectively only four and six years of age at his death, and that his widow, the defendant Amy A. Walsh, never knew that he had assumed any obligation to support his mother until the commencement of this action, and had never been requested, either by her or by anyone else, to furnish her any support. These findings are amply supported by the evidence.

The court further found that as Burke had faithfully performed his agreement from the time of entering into it, in 1887, until his death in 1910, and as his mother is now dead and no equitable adjustment can be made, "it would be inequitable and unfair to cancel said deed of the 'home forty'" and rendered judgment dismissing the action.

The agreement for support is not mentioned in the deed nor in any writing, but rests upon the verbal testimony of the present plaintiff and his sisters, to the effect that in the family conferences, preceding the execution of the deeds, Burke assured his mother that he would support her. Although the mother retained a life estate in the land in controversy, the conduct of the parties during a period of more than 20 years leaves no doubt that both understood and intended that Burke should have the use of it in providing a livelihood for himself and his mother.

Owing to the peculiar character of such transactions, and the fact that usually they are between the aged and their near relatives, and result from the confidence which one reposes in the other, conveyances of prop-

erty in consideration of an agreement for future support are placed in a class by themselves; and the courts, when called upon to enforce rights growing out of such contracts, endeavor to give effect to the intention of the parties so far as possible, and to protect both by affording each such relief as in equity and good conscience he is entitled to under the facts of the particular case. The courts consider each case on its own facts, and in the exercise of their broad equitable powers, will grant whatever relief will most nearly work out substantial justice. *Bruer v. Bruer*, 109 Minn. 260, 123 N. W. 813, 28 L.R.A. (N.S.) 608; *O'Rourke v. O'Rourke*, 130 Minn. 292, 153 N. W. 607. The conveyance may be canceled, on condition that the grantee be reimbursed for expenditures of which the grantor has received or will receive the benefit, if this will produce an equitable result and the rights of the grantor cannot be properly safeguarded otherwise, or, in proper cases, the grantee may be permitted to retain the property, on condition that he comply with the requirements of the contract and make compensation for past delinquencies. *Johnson v. Paulson*, 103 Minn. 158, 114 N. W. 739. But the conveyance will not be canceled where it would be inequitable to do so. *Haataja v. Saarenpaa*, 118 Minn. 255, 136 N. W. 871.

The case of *McKenzie v. Dunsmoor*, 114 Minn. 477, 131 N. W. 632, in its essential facts, is much like the instant case. In 1896, Mr. and Mrs. Dunsmoor conveyed the premises there in controversy to Stephen W. Budd in consideration of an agreement by him to support them. Budd and his wife took possession of the land and performed the contract until the death of Budd in 1900. His widow continued to perform until the death of Mr. Dunsmoor in 1902. Shortly thereafter she rented the premises to one Henderson under an agreement that, in lieu of rent, he should care for and support Mrs. Dunsmoor. The latter soon became dissatisfied, and took up her residence with one Empey, where she resided until her death in 1908. Out of her own means, she paid the expenses of her husband's last sickness and funeral and for her own support while residing with Empey. The widow of Budd was requested by Empey to take Mrs. Dunsmoor back and care for her, but refused to do so. The court said that the deed should not be canceled, where a substantial performance of the contract rendered such cancelation inequitable, and held that, in view of the long-time performance, the failure of the widow to

pay some bills which she ought to have paid and her refusal to take Mrs. Dunsmoor back and care for her, did not warrant a conclusion that the consideration for the deed had failed, or that she had failed to substantially comply with the conditions on which the property was conveyed, and that the cancelation of the deed would be too drastic a remedy and not equitable. We think this reasoning applies with equal if not greater force in the present case, and that the facts do not warrant a cancelation of the conveyance.

In the McKenzie case the court further said:

"The pleadings preclude granting defendants any relief other than a cancelation of the contract. No facts are alleged to form the basis of any lien or claim for repayment of money paid by Mrs. Dunsmoor for her support and expenses, and no relief of this character is asked."

The same situation exists in the instant case. The only relief sought was the cancelation of the contract, and there is neither allegation nor proof of any facts upon which to base a claim for the value of the support not furnished, even if such a claim survived the death of the mother and could be enforced for the benefit of her estate, which is doubtful in view of the decision in *Penas v. Chervený*, 135 Minn. 427, 161 N. W. 150, L.R.A. 1917E, 655.

The trial court correctly disposed of the case and its judgment is affirmed.

HAROLD E. WADE, AS ADMINISTRATOR, v. NATIONAL BANK
OF COMMERCE OF MANKATO.¹

November 21, 1919.

No. 21,474.

Venue — defendant estopped from raising question.

1. By answering in an action in replevin without objecting to the venue and asking affirmative relief, and by stipulating to a transfer of the property involved, during the pendency of the suit, to the custody of a party in the county where the action was instituted, a defendant is precluded from raising the question whether the suit can be maintained in

¹Reported in 174 N. W. 889.

any other county than the one wherein the property was located when the action was begun.

Replevin — defendant not entitled to judgment upon pleadings.

2. Defendant was not entitled to judgment on the pleadings. The general allegations of ownership and right of immediate possession in the complaint were sufficient, until met with the answer that the defendant was a bona fide holder, and then the reply could properly join issue on that point.

Same — what is sufficient description of the property.

3. A description of the property in a replevin action is sufficient, if therefrom the officer may identify the property to be seized and defendant the property involved, so that a proper defense may be made.

Construction of contract — conditional delivery.

4. The delivery at the same time of an insurance policy, a promissory note for the premium therefor, and a written contract concerning a return of the "premium" held to constitute one transaction. And when so considered, in the light of surrounding circumstances, the contract should be construed as an agreement that the payee in the note was to return it to the maker, if, at any time within 60 days, the maker obtained more satisfactory insurance than contained in the policy mentioned, thus making the delivery conditional.

Promissory note — bona fide holder — burden on defendant.

5. The fact being proven beyond dispute that under the agreement plaintiff was entitled to the possession of the note, the sole issue left was whether defendant purchased the same without notice of the agreement, and the court correctly charged that the burden was upon defendant to show itself a bona fide holder in due course, without notice.

Same — oral testimony of conditional delivery admissible.

6. There was no error in admitting oral testimony to the effect that the delivery of the promissory note was conditional, nor as to what should be done with the insurance policy if other insurance was effected, since nothing in regard to that matter is contained in the written instruments then delivered.

Same.

7. The written contract referred to did not permit a transfer of the note before the expiration of the 60 days therein specified.

Evidence — immediate transfer not allowed.

8. The evidence is sufficient to warrant the jury in finding that defendant was not a bona fide holder of the note, in due course, without notice.

No estoppel against plaintiff.

9. The evidence does not show plaintiff estopped from claiming a return of the note.

New trial denied.

10. Certain other grounds for a new trial considered and *held* without merit.

Action in replevin in the district court for Martin county to recover possession of a promissory note or for \$1,425.60 its value. The case was tried before Dean, J., and a jury which returned a verdict in favor of plaintiff. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

H. L. & J. W. Schmitt, H. W. Volk, Hughes & Ellsworth and Paul C. Cooper, for appellant.

J. E. Haycraft, for respondent.

HOLT, J.

Action in replevin for the possession of a promissory note. Verdict for plaintiff and defendant appeals from the order denying its motion in the alternative for judgment notwithstanding the verdict or a new trial.

On June 26, 1917, F. E. Wade delivered his promissory note, payable to the order of C. D. Buckpitt, to the payee. The note was for \$1,425.60, due in 90 days from the date mentioned. It is undisputed that the note represents the amount of the premium for a life insurance policy then delivered to Wade, and that, as part of the transaction, Buckpitt made and delivered to Wade this agreement: viz.:

"Dear Mr. Wade: In accepting settlement for policy No. 2,248,089 it is hereby agreed that in event of your being able to secure a policy or policies in other companies that will be more satisfactory to you within sixty days, the premium of Fourteen hundred and twenty-five 60/100 dollars (\$1,425.60) will be returned to you without reservation.

"C. D. Buckpitt,
"Spl. Agt."

Wade testified that Buckpitt solicited the insurance, but that Wade was unwilling to accept a policy upon the terms proposed, thinking he could

obtain cheaper insurance in other companies; that thereupon it was agreed that Wade should receive the policy mentioned conditionally, to be returned if, at any time within 60 days thereafter, Wade was able to obtain more desirable insurance, and in that case the note also should be returned to Wade; that within the 60 days Wade did find more acceptable insurance, and thereupon, within said time, notified Buckpitt thereof and returned the policy he had received from him. Upon these facts, and a demand for the possession of the note, plaintiff predicated his suit. The defense was that defendant in due course purchased the note, before maturity, for value, and without notice.

Before considering the merits of the controversy, some questions of practice, raised by defendant, must be disposed of.

It is said the venue was laid in the wrong county, therefore the district court of Martin county was without jurisdiction, the point being that section 7718, G. S. 1913, provides that, except in cases where the taking was wrongful, plaintiff must bring the action in the county where the property is when the suit is brought. Here the note was in possession of defendant in Blue Earth county when the action was instituted in Martin county. The defendant is not in position to invoke an application of the statute, even were it construed as defendant's counsel contends. It answered without objecting to the venue, and, after alleging title, asked affirmative relief that it be adjudged the owner and entitled to the possession of the note, and in case a delivery thereof cannot be had it be awarded \$1,425.60 with interest. Furthermore, the fact seems to be that on October 13, 1917, the note was delivered to a bank in Martin county, under a stipulation that said bank should keep it during the pendency of the action and deliver it to the party designated and ordered by the court therein. By what is above said, we do not intimate that there is no jurisdiction to entertain a replevin action in any other district court than the district court of the proper county for the bringing of such action under the provision of said section 7718.

It is claimed that defendant was entitled to judgment on the pleadings, because they disclose that the note was no longer in the possession of the party whose signature appears thereon; hence, under section 5828, G. S. 1913 (section 16 of the Negotiable Instruments Act), "a valid and intentional delivery by him is presumed until the contrary is proved." The

answer to the contention is that the allegations of the reply present the issue that the delivery was conditional and special and not for the purpose of transferring title, which issue, if maintained by plaintiff, entitled him to reclaim the note under the first provisions of the section mentioned, unless defendant was a good faith purchaser for value, before maturity, and without notice. The general allegations in the complaint of ownership and right of possession were sufficient, until defendant came with its allegation of title through purchase, which was then properly met by the reply.

There is no merit in the claim that there is a fatal variance in the description of the note in the complaint, in that the words "or order" are omitted. Such a description as will sufficiently point out the property for seizure, so that the officer may be enabled to execute the writ and the defendant to defend his right of possession, is all that is required in the complaint. There is no difficulty here. The answer gave a more particular description than the complaint, and this the reply acknowledged to be correct. There could be no issue raised in respect to the identity of the note.

A proper view of the case, and the trial, may be had by considering whether, upon the transaction of June 26, 1917, Wade could have recovered possession of the note from Buckpitt, if held by him, after Wade had, within 60 days, obtained other more acceptable insurance, had returned the policy delivered to him by Buckpitt, and had demanded a return of the note. There can be no possible doubt of Wade's right to so do, provided the word "premium" in the agreement means this note.

Of course "premium" with reference to insurance contracts has a well understood meaning. Usually it refers to the amount in cash which the insured pays to the insurer for keeping the policy in force during a stated period. But often promissory notes are accepted in lieu of the money. In this case, there can be little doubt that the writing signed by Buckpitt, in the light of the circumstances surrounding its execution and unaided by any testimony as to what the parties then stated, should be construed to mean that this note should be returned, and not \$1,425.60 in money. No premium other than the note had been received by Buckpitt or the insurance company. The stipulation for a return should, in the absence of explanation, be taken to mean a return of the identical thing

received thereunder, upon the happening of the specified contingency. The delivery of the insurance policy, the written agreement, and the note was but one transaction. We therefore think the trial court was right in construing the writing which Buckpitt signed to be an agreement for the return to Wade of this note in the event he, within the time specified, procured other insurance more satisfactory to him. There was no dispute in the evidence that, within the 60-day period, Wade obtained such other insurance, that he returned the policy specified in the agreement to Buckpitt, and demanded a return of the note.

The controverted issue of the trial was therefore narrowed down to the question of whether or not defendant was a bona fide holder in due course and without notice; and on that issue, the agreement having been proven, and it being indisputably a part of the note transaction, we also think the trial court right in charging the jury that the burden was upon defendant to prove that it was a bona fide holder, without notice, notwithstanding the character of the action. It seems also that the charge was right, on the theory that the title to the note was defective in that it was negotiated by Buckpitt "in breach of faith, or under such circumstances as amount to a fraud." Section 5867, G. S. 1913; *McWethy v. Norby*, 143 Minn. 386, 173 N. W. 803.

Defendant insists that it was entitled to a directed verdict, the main grounds being: The agreement to return the note was executory and had not been breached when the note was bought, the delivery was not conditional, the notice the bank had did not disclose any defense, and plaintiff is estopped from asserting lack of bona fides.

Running through the arguments on these propositions is the claim that the conversations relative to the transaction were merged in the agreement and were inadmissible to vary or contradict the terms thereof. Objections were made and exceptions taken to testimony as to what was said between Wade and Buckpitt at and prior to the transaction of June 26, 1917. Insofar as this evidence would tend to show a conditional delivery of the note it was admissible. *Mendenhall v. Ulrich*, 94 Minn. 100, 101 N. W. 1057. The delivery of the note could hardly be other than conditional, since it was subject to be returned to Wade at any time, within the period fixed, if the latter procured more satisfactory insurance. As tending to show the conditional character of the delivery

the testimony was properly admitted that Buckpitt said "that that note wouldn't go any farther than him until the sixty days was up; it wouldn't be used in any way." Again, it is clear that the writings do not undertake to cover the entire transaction. Therein nothing is said as to what Wade should do with the policy he received from Buckpitt upon the happening of the event which called for a return of the note. Hence the conversations were admissible to show what was agreed in that respect, namely, that the policy mentioned in the agreement should be returned to Buckpitt. *French v. Yale*, 124 Minn. 6, 144 N. W. 451. And, when so shown, it became a circumstance to be taken into consideration in a construction of the written agreement. Nothing of substance is found in the testimony of Wade as to what was said when the note, policy and agreement were delivered, except the above quoted statement of Buckpitt and that of the return of the policy to Buckpitt.

There is no merit in the claim that the agreement is executory, and hence, prior to a breach, defendant could purchase the note in disregard of the agreement, even though it had notice thereof. A purchaser with notice would stand in the shoes of Buckpitt, and he, on the undisputed facts of this case, could neither have recovered upon the note, nor defended against a suit by Wade for its possession.

The conditional character of the delivery has already been disposed of contrary to defendant's contention. Assuming the truth of Wade's testimony, it is, nevertheless, contended the evidence shows that the notice defendant had did not disclose a defense, or such facts that its purchase of the note thereafter could be held to have been in bad faith. Wade testified that, on June 28, defendant's cashier called him at Fairmont by long distance telephone from Mankato and, after introducing himself, "he asked me if I had given Mr. Buckpitt a note for \$1,425.60, or if I signed a note, and asked me what it was for. I told him I had made a note to Mr. Buckpitt for life insurance, but it was not to be cashed for sixty days. And he says, 'Mr. Buckpitt wants to talk to you' and Mr. Buckpitt then took the phone. * * * Mr. Buckpitt said to me that he was owing quite a board bill there and the company wanted to get their money out of that, and he wanted to know if it was all right to use it as security to clean up some debts. I told him under the agreement he was to hold that note." The jury could readily find from this

that, when the cashier learned that there was some agreement which interfered with a transfer of the note, he purposely refrained from learning more, and placed Buckpitt in communication with Wade to see whether the agreement could not be modified or waived. We are of the opinion that the jury could find that such circumstances came to the cashier's notice touching the agreement and conditional delivery of the note, that his failure to pursue further inquiry before buying amounted to bad faith.

In this connection we observe that the notice here conveyed information of an agreement not to transfer the note which under the decision in *Snelling State Bank v. Clasen*, 132 Minn. 404, 157 N. W. 643, would be quite sufficient. In that case the note had on its back the words "as per contract," and a contract accompanied the note, when purchased, which, however, did not affect the negotiability of the note; therefore, it was held that the purchaser was not put upon inquiry by the words on the note (which could not be disregarded) for another contract prohibiting its negotiation. But the opinion holds that, if there had been facts suggesting an inquiry for the second contract, the purchase would not have been bona fide. The jury in the case at bar could find from the evidence that defendant had notice of an agreement prohibiting a transfer of the note.

No estoppel can be discovered in the fact that Wade permitted the note to be made in negotiable form, since the jury could find, and did find, that defendant bought with notice.

No prejudicial error was made in the reception of Wade's testimony as to the conversation with defendant's cashier after the purchase of the note. This was admissible on the theory that the cashier in his official capacity sought an interview with Wade concerning the note.

In view of the stipulation, under which the Fairmont Bank held the note pending the trial, to be delivered to the party the court should order, there is no merit to the contention that there was a mistrial because the jury omitted to find the value of the note.

A new trial was asked because of misconduct of plaintiff's counsel. Granting or refusing a new trial on that ground rests largely in the discretion of the trial court. *Smith v. Great Northern Ry. Co.* 133 Minn. 192, 158 N. W. 46. No abuse of that discretion appears in this case.

There are many other assignments of error than those so far noticed. They have all received attention, but their discussion is not deemed necessary. They do not call for a reversal.

The order is affirmed.

THEODORE KRAMER v. COUNTY OF RENVILLE AND
ANOTHER.¹

November 21, 1919.

No. 21,501.

School district — annexation of territory by county board.

1. The proviso added as an amendment to section 1286, R. L. 1905, authorizes the board of county commissioners to attach the territory of an adjoining school district to a school district having a borough, village or city of not more than 7,000 inhabitants wholly or partly within its boundaries, on the petition of a majority of the legal voters of the latter district, if it deems such annexation "conducive to the good of the inhabitants of the territory affected."

Same — statute constitutional.

2. School districts are governmental agencies wholly under the control of the legislature, and the statute does not infringe any rights secured by the Constitution.

After the former appeal reported in 141 Minn. 300, 170 N. W. 216, the case was tried before Daly, J., who made findings and confirmed the action of the county board. From an order denying their motion to amend the findings, conclusions of law and order for judgment, or for a new trial, plaintiffs appealed. Affirmed.

Murray & Baker and *P. W. Morrison*, for appellants.

J. M. Freeman, for respondents.

TAYLOR, C.

This is the second appeal in this proceeding. On the first appeal the cause was remanded for a new trial. *Common School District No. 85 v. County of Renville*, 141 Minn. 300, 170 N. W. 216. As a result of

¹Reported in 175 N. W. 101.

the second trial, the order of the board of county commissioners enlarging Independent School District No. 79 of Renville County by attaching thereto the adjoining territory theretofore organized as Common School District No. 85, was affirmed.

It is contended on this appeal that in order to give the board authority to enlarge district No. 79, by incorporating therein the territory of district No. 85, the petition therefor must be signed by a majority of the freeholders of both districts who are qualified to vote at school meetings; and, as the petition in question is signed only by legal voters residing within district No. 79, that the board was without jurisdiction and its action of no force or effect.

Section 1286, R. L. 1905, provided that upon petition of "a majority of the freeholders of each district affected, qualified to vote at school meetings, the boundaries of any existing district may be changed, or two or more districts consolidated, or one or more districts annexed to an existing district." This statute clearly required a petition signed by a majority of the qualified petitioners of each district. This statute, however, was subsequently amended by adding a proviso at the end thereof, which, among other things, authorized the board of county commissioners to enlarge any school district which included "within its boundaries part or the whole of any incorporated borough, village or city of seven thousand inhabitants or less" by attaching thereto "lands within and outside of such incorporated borough, city or village, but * * * contiguous to said district" on the petition of "a majority of the legal voters residing within such school district." The amendment, as the latest expression of the legislative will, must be given effect, and is controlling in proceedings brought under it, if the prescribed conditions exist; and, as to such proceedings, supersedes the original act insofar as the two are inconsistent. As stated on the former appeal, the amendment authorizes the enlargement of a school district having within its boundaries an incorporated borough, village or city of not more than 7,000 inhabitants, "on a petition of a majority of its own legal voters," regardless of whether such petition is or is not signed or concurred in by the residents of the other districts affected. It has already been determined that the territory added, if contiguous to the district, may lie wholly outside the incorporated borough, village or city. School Dis-

trict No. 36 v. School District No. 31, 130 Minn. 25, 153 N. W. 253. The statute contains no provision limiting the quantity or territorial extent of the lands which may be added, and we find nothing therein which we can construe as forbidding the annexation of an entire district, in case the board shall find such annexation "conducive to the good of the inhabitants of the territory affected."

It is further contended that the statute infringes the rights secured to citizens of the state by section 2 of article 1 of the state Constitution and section 1 of the Fourteenth Amendment to the Federal Constitution, in that it authorizes a school district having a borough, village or city wholly or partly within its boundaries, to annex an adjoining district without the consent of the latter.

The school districts of the state are governmental agencies established by legislative authority to perform the public duty of educating the children of the state. The powers given them are granted solely for the purpose of enabling them to perform this public duty. As governmental agencies they are always under the control of the legislature which may modify or abrogate their powers and privileges to any extent that it may see fit. Their boundaries or territorial jurisdictions may be enlarged, diminished or abolished in such manner and through such instrumentalities as the legislature may prescribe. 24 R. C. L. 562, sections 6 and 7, and numerous cases there cited; *City of Winona v. School District No. 82*, 40 Minn. 13, 41 N. W. 539, 3 L.R.A. 46, 12 Am. St. 687; *Charles Bank v. Brainerd School District*, 49 Minn. 106, 51 N. W. 814; *Associated Schools v. School District No. 83*, 122 Minn. 254, 142 N. W. 325, 47 L.R.A.(N.S.) 200; *Common School District No. 85 v. County of Renville*, 141 Minn. 300, 170 N. W. 216.

The constitutional provisions cited do not apply to governmental agencies nor restrict the power of the legislature over such agencies. Neither is section 33 of article 4 of the Constitution infringed by this statute, for it is a general law applicable to all districts having a borough, village or city of not more than 7,000 inhabitants partly or wholly within its boundaries.

Order affirmed.

STATE EX REL. THE BRODERICK COMPANY v. DISTRICT
COURT OF RAMSEY COUNTY AND ANOTHER.¹

November 21, 1919.

No. 21,514.

Workmen's Compensation Act — actual disability — specific injuries.

1. The intent and purpose of the Workmen's Compensation Act was to secure to an injured employee compensation to the extent of the disability actually sustained, and the provisions as to payments for specific injuries must yield thereto when taken together they create a greater disability.

Same — permanent partial disability.

2. The findings of the trial court that the injuries referred to in the opinion created a permanent partial disability of plaintiff's hand *held* sustained by the evidence.

Upon the relation of The Broderick Company the supreme court granted its writ of certiorari directed to the district court for Ramsey county and the Honorable Charles C. Haupt, judge thereof, to review proceedings in that court under the Workmen's Compensation Act brought by Viola Beyl, as employee, against relator, as employer. Affirmed.

Watson, Sexton & Mordaunt, for relator.

Emil W. Helmes, for respondent.

BROWN, C. J.

Certiorari to review a judgment of the district court of Ramsey county in a proceeding under the Workmen's Compensation Act. The facts are substantially as follows: Plaintiff in the proceeding on the seventeenth day of August, 1918, was in the employ of defendant in its printing establishment as a press feeder. In some accidental way her left hand was caught in the machine she was operating and was severely mangled and injured. The trial court found that the little finger was so seriously mangled as to necessitate amputation at the middle of the fourth meta-

¹Reported in 174 N. W. 826.

carpal bone; that the third metacarpal bone was fractured, and, not having been reduced, united irregularly and in a curved shape, thereby shortening it a quarter of an inch, impairing its power and usefulness; that as a consequence of the injury infection intervened as a contributing cause to lessen and reduce the effectiveness of plaintiff's left hand as a whole, and further that the usefulness of the hand had thereby been reduced and destroyed one-half, constituting a permanent partial disability within the meaning of the compensation act. Judgment ordered accordingly.

The only question presented by the record is whether the findings of the court to the effect that plaintiff suffered a permanent partial disability are sustained by the evidence. Our examination of the record discloses ample evidence to support the findings. A discussion thereof would serve no useful purpose and we refrain. While the compensation act makes express provision for the loss of fingers, from the thumb down, it does not necessarily follow therefrom that an injury of the character here disclosed should be treated as a matter of law as the loss of the little and ring fingers only. If the nature of the injury in such a case, taken as a whole, shows by relation a reduction in the power and usefulness of the hand, as well as the injury to and loss of the fingers, the court may and properly should find the fact accordingly, for the intent and purpose of the compensation act secure to the injured employee compensation for the disability actually sustained. *State v. District Court Clay County*, 129 Minn. 91, 151 N. W. 530.

Within the rule guiding us in cases of this character the evidence sustains the findings and the judgment must be and is affirmed.

J. E. MEYERS, AS MAYOR OF THE CITY OF MINNEAPOLIS
v. HENRY N. KNOTT AND OTHERS.¹

November 21, 1919.

No. 21,681.

Municipal corporation — franchise ordinance — approval by mayor.

1. A franchise ordinance, adopted under the provisions of chapter 124,

¹Reported in 174 N. W. 842.

Laws of 1915, by a majority vote of the city council, need not be submitted to the mayor of the city for his approval.

Same — call for special election — compliance with statute.

2. The calling of a special election by the city council, to be conducted in all respects as required by the general election laws of the state, for the submission of a franchise ordinance to the voters of the city for ratification, to be held not less than 90 days after the filing of the acceptance of the proposed franchise by the car company, is a sufficient compliance with the provisions of chapter 124, Laws of 1915.

Same — construction of franchise.

3. The proposed franchise considered and *held* not to surrender, by its provisions, the old car company franchise and the obligations incurred thereunder.

Same — consideration sufficient.

4. The proposed franchise considered and *held* to provide for ample consideration moving to the city for the franchise and rights thereby granted to the car company, to answer the requirement of chapter 124, Laws 1915.

Same.

5. Such franchise provides for the regulation of the affairs of the car company by the city council, and does not nullify the same by subsequent provisions.

Action in the district court for Hennepin county to restrain defendants from calling and conducting any election under the proposed street-railway franchise or ordinance or treating the ordinance under any circumstances as a valid ordinance or contract between the city and the company. From an order, Molyneaux, J., denying his motion for a temporary injunction, plaintiff appealed. Affirmed.

A. B. Jackson, J. E. O'Brien and C. J. Rockwood, for appellant.

C. D. Gould, W. D. Dwyer, Lancaster & Simpson and George B. Leonard, for respondents.

QUINN, J.

By chapter 124, p. 166, Laws of 1915, authority is granted to the city council or other governing body of any city in this state, then or thereafter having a population of more than 50,000 inhabitants, to grant a

franchise for the construction, extension, maintenance and operation of street railways in and upon the streets and other public ways within or outside its boundaries, by pursuing the procedure and complying with the conditions therein stated and set forth. Among other things the statute, or enabling act, as it may be properly termed, provides that the franchise so authorized to be granted shall be in the form of a city ordinance and adopted by a majority vote of the city council, subject to approval or rejection by the voters of the municipality at a general or special election to be held at the time and called in the manner therein provided. Provision is made for the acceptance of the proposed franchise by the street-car company after the adoption thereof by the city council, and the filing of such acceptance with the city clerk, and the election for submission of the question of adoption to the people cannot be held until the lapse of 90 days from the date of such acceptance.

The enabling act applies to the city of Minneapolis, for it has the required population, and in due proceedings had for the purpose, the city council thereof, by a majority vote of the members, duly adopted the ordinance or proposed franchise involved in this action, by which a franchise to the defendant railway company was conditionally granted; the conditions being the acceptance thereof by the company and the ratification by the voters of the city. The company is now operating lines of street railway in and upon the streets of the city under a previously granted franchise which expires in 1923. The ordinance was adopted by the city council in conformity with rules governing its action in such matters, except that it was not submitted to the mayor for his approval or disapproval. It was so adopted on September 3, 1919, and within the time fixed by the enabling act was formally accepted by the street-car company. Thereupon the city council, by resolution, duly called an election for the submission of the question of ratification or rejection to the voters, the date thereof being fixed for December 9, 1919, which was more than 90 days after the acceptance of the street-car company had been filed with the city clerk, as required by the statute.

Plaintiff, who is the mayor of the city, then brought this action to restrain and enjoin the proposed election, upon the grounds and for the reasons presently to be stated, and he appeals from an order denying his application for a temporary injunction pending this action.

It is contended in support of the action and of the assignments of error challenging the refusal of the trial court to grant a temporary injunction: (1) That the adoption by the city council of the ordinance, or proposed franchise, was not in compliance with the enabling act, in that it was not submitted to the mayor for his approval or disapproval; (2) that the election for the submission of the question of adoption to the voters was not called in the manner required by the enabling act; (3) that the proposed franchise attempts without authority to release the street-car company from all obligations under the existing franchise upon the adoption of the new; (4) that no compensation to the city is provided for as required by the enabling act; and (5) that certain other provisions of the franchise, one of which creates a rule of evidence in respect to reports of the street-car company which have been made and filed as required, are in excess of the authority granted by the enabling act and therefore void.

The courts have often been invoked, at the suit of a taxpayer or an interested legal voter, in controversies of this and analogous character, to exercise their restraining power to interrupt and stay the exercise of the legislative as well as the contractual power and authority of local municipalities, and the rule controlling their action in that respect is well settled. The courts will interfere in such matters in exceptional cases, and only when the threatened action of the municipality is forbidden by law and therefore illegal, or where the consummation thereof will in itself result in irreparable injury, cause a multiplicity of suits, or violate previously existing contractual rights. The rule applies by analogy to the case at bar. And guided thereby we have considered the various points presented in support of the action. They do not require extended discussion. None are fatal to the validity of the proceedings, and for the most part the contentions made are in essence and substance critical, presenting matters of objection to the merits of the proposed franchise, proper for consideration by the voters in passing upon the question of ratification or rejection.

The principal contention made is, that the proposed franchise was not adopted as required by the enabling act, since it was not submitted to the mayor for his approval, and that it is therefore void and should not be submitted to the voters. The defect, if any exists in the passage and

adoption of the ordinance by the council, is one of procedure, and it is doubtful whether the case in that respect comes within the rule permitting judicial interference before the completion of the municipal proceedings. But, assuming for the purpose of this case that the question is properly before us, we have no difficulty in holding that the point is without substantial merit.

1. Under the charter of the city of Minneapolis the mayor is given the power of veto of legislative enactments passed and adopted by the city council, and the veto when used annuls the enactment, unless subsequently repassed by the council by a two-thirds vote of its members. The enabling act in question provides that the power there conferred upon the city council to grant a franchise "shall be exercised only by ordinance,"¹ to be adopted by a majority vote of its members at a regular meeting thereof. The argument is that since the enabling act expressly requires that a proposed franchise shall take the form of an ordinance, to be passed and adopted by a majority of the members of the city council, adopting in that respect the legislative procedure applicable to other legislative enactments, by necessary implication the veto power of the mayor applies, requiring as a condition to a valid passage by the council the submission to the mayor for his approval. The argument is plausible but not persuasive.

In our view of the question, the express language of the enabling act properly construed conclusively answers the question adversely to plaintiff's contention. It declares that the authority to grant franchises of the kind shall be "unrestricted by any provision of statute or charter."² To hold that the veto power of the mayor must be taken into account, and a proposed franchise submitted to him, would necessarily nullify that part of the enabling act which declares that a majority vote of the council is all that is necessary to a valid passage of the ordinance, and would result in adding to the enabling act by judicial construction the further provision "that if the mayor shall veto any such proposed franchise, then to give it force or validity, or entitle it to submission to the voters, a two-thirds vote must be had to repass the same over the veto." This the court is not authorized to do. It is clear that the legislature, in enacting the statute, did not intend that the mayor or other chief magistrate of the municipality acting thereunder should be an official factor in the

¹[c. 124, § 6.] ²[c. 124, § 1.]

proceedings at all. The act deals wholly with the city council, and there exists no sound reason why the mayor and his veto should take part. The franchise takes the form of an ordinance, and, as it leaves the city council, is nothing more than a contract proposed to the car company, to be ratified by the voters as they may deem for the best interests of the municipality. The veto of the mayor can add nothing to the situation, for what would be contained in a veto message, if that course were pursued, could with equal force by a public address or circular be brought to the attention of the voters, where rests the final word in the matter.

The further argument, the real foundation for what is claimed in this respect, that the authority granted by the enabling act was in fact conferred upon the city or other municipality to which it applies, and not upon the municipal council, as expressly stated in the act, is clearly not sound, though we do not conceive that the question would be in any material sense different were that point conceded. The fact remains that the enabling act does not provide for a mayor's veto, and the court is without authority to read one into the statute.

2. The contention that the election for the submission of the matter to the voters was not called in the manner required by the enabling act is not sustained. This point goes exclusively to the form and not to the substance of the proceedings. The election was called by action of the council after the car company had accepted the proposed franchise, and the date thereof is within the time specified by the enabling act. It is not a matter of substance that the date was not named in the franchise ordinance. It was formally announced by appropriate action under provisions that it be conducted in all respects as required by the election laws of the state. A special election was called and the enabling act is ample authority therefor.

3. We find no merit in the claim that the ordinance is bad, in that it attempts to surrender the old car company franchise and all obligations incurred by the company thereunder. By necessary result the old franchise will lapse and be superseded by the new when it shall come into life and operation, and the future rights of the car company and the public will be governed and controlled thereby. But this does not mean that obligations arising under the old franchise and not yet discharged by the car company will become, by operation of law or otherwise, dis-

charged without performance. The future will be under the new contract; the past under the old, until discharged by performance.

4. We find ample consideration moving to the city for the franchise and rights thereby granted to the car company to answer every requirement of the enabling act.

5. The franchise makes certain provisions for the regulation of the affairs of the car company by the city council, and it is clear that they are not all nullified and contracted away by subsequent provisions, as contended by counsel. The franchise also provides for the purchase of the car line property and a maximum valuation thereof is named. The claim is made that an improper basis was adopted in fixing the amount, in that certain properties were included therein, of which the car company was not the exclusive owner, and that the franchise improperly provides for the payment of such amount, whether the property be acquired by the city by purchase or condemnation, and, further, that the franchise provides for increasing the amount so fixed by additions and improvements, but does not provide for diminishing the same by depreciation in value or other losses. These matters have been fully considered, and we find therein nothing in violation of the terms of the enabling act which the court may declare as a matter of law to nullify the whole franchise. Some of the provisions of the franchise, not necessary to here specify particularly, are not open to the construction given them by plaintiff, and furnish no sufficient foundation for the action.

6. The other matters complained of present no material for comment. We find in the eleventh, twelfth and thirteenth points specified in the brief no reason for declaring an excessive exercise of authority by the city council. The subjects therein referred to, including the provision that statements of account prepared and filed by the car company as required by the franchise shall be treated as prima facie evidence in all actions and proceedings wherein they may be involved, are far from a character to nullify the whole franchise. Those and many of the other provisions of which complaint is made are proper for consideration by the voters, but do not rise to sufficient importance to justify judicial interference. The matter is for the people, and the courts should not, for the reasons here presented, prevent them from giving expression to their views at the polls.

This covers all that need be said. There was no error in the refusal of the trial court to grant a temporary injunction, and the order appealed from is affirmed.

STATE EX REL. C. D. WHIPPLE v. OSCAR MARTINSON,
SHERIFF OF HENNEPIN COUNTY.¹

November 21, 1919.

No. 21,700.

No conflict between 1915 Act and Harrison Narcotic Drug Act.

1. Chapter 260, Laws 1915, restricting the manufacture, sale and dispensing of certain habit forming narcotic drugs, as involved in *State v. Whipple*, 143 Minn. 403, *held* not in conflict with the act of Congress known as the Harrison Narcotic Drug Act, and that the judgment of conviction therein rendered is not unlawful as violative of the paramount legislative power of the Federal Congress or otherwise.

Upon the relation of C. D. Whipple the district court for Hennepin county granted its writ of habeas corpus directed to Oscar Martinson, sheriff for that county, who had the custody of relator by virtue of a warrant of commitment of said court. The matter was heard by Molyneaux, J., who quashed the writ and remanded relator to the custody of the sheriff. From the order quashing the writ, relator appealed. Affirmed.

Charles B. Elliott, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, and *William M. Nash*, County Attorney, for respondent.

BROWN, C. J.

Habeas corpus to effect the release and discharge of relator from the custody and restraint of respondent. The facts are as follows:

Relator, a practicing physician, duly licensed as such under the laws of the state, was indicted and convicted in the district court of Hennepin county of a violation of chapter 260, p. 358, Laws 1915, and sentenced to a term in prison. Respondent, as sheriff of the county, holds him in

¹Reported in 174 N. W. 823.

custody by virtue of a warrant of commitment issued on the judgment of conviction. The judgment was affirmed on appeal to this court. 143 Minn. 403, 173 N. W. 801. Reference is here made to the opinion there rendered for a statement of the facts and the terms and provisions of the statute under which the conviction was had. The particular provision of the statute, as there construed, prohibits a physician from furnishing the drug to habitual users, out of stocks kept on hand, and limits the right of the physician to furnish it to the usual prescription to be filled by a druggist. Relator furnished the drug direct from his stock, which the statute declares unlawful. Such was the basis of his conviction.

Relator contends that the paramount right of legislation upon the subject matter of the statute rests with the Federal Congress. That in the exercise of that right Congress duly enacted sections 6287g, et seq. U. S. Comp. St. 1918, being an act regulating the importation, manufacture and sale of opium and the various compounds thereof, approved December 17, 1914, known as the Harrison Narcotic Drug Act. And that the statute of this state, insofar as it conflicts with the terms and provisions of the act of Congress, is unconstitutional and inoperative and void. Relator further contends that the Federal statute permits an act such as that here in question, which the state statute condemns, therefore, that in respect to such conflict the state statute falls and the conviction of relator thereunder becomes unlawful as violative of the paramount Federal authority, entitling relator to discharge from further restraint. The validity of the act of Congress was sustained in the case of *U. S. v. Doremus*, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. ed. 493.

Conceding, without considering or deciding the point, which we think of doubtful merit, that the right of legislation upon the subject in hand is paramount in the Federal Congress, and that the state statute is void insofar as it conflicts with the act of Congress, we are unable, after careful examination and comparison of the two statutes, to discover any conflict in the respect here claimed. It would serve no useful purpose to attempt to analyze the respective enactments, and we are content with announcing the conclusion stated without further comment.

The writ is therefore in all things discharged, but the commitment of relator to prison will be stayed for 30 days from the filing hereof, to enable him to take such further proceedings in the premises as he may

be advised. Relator may be admitted to bail during the stay, upon filing a bond in the office of the clerk of the district court in the penal sum of \$2,500; the sureties thereon to be approved by a judge of the district court, and the bond to be conditioned in all respects as required by law in such cases.

IN THE MATTER OF THE ESTATE OF FRANK H. PEAVEY,
DECEASED.

LUCIA L. HEFFELFINGER AND OTHERS v. KATHERINE
JORDAN PEAVEY APPLETON.¹

November 28, 1919.

Nos. 21,331, 21,332.

Will — residuary estate — construction.

1. A will gave certain legacies and created several trusts directing the deposit of funds in trust, the income to be paid to beneficiaries for life. On the death of each legatee, the funds deposited for his benefit were to become part of the residuary estate. The will directed that the balance of the estate be transferred to a corporation to be formed. The residuary estate, made up mostly of the returned deposits, the will gave to the wife and children of the testator and provided: "That if either of my children shall die without leaving a child or children, then the share of such child shall become the property of the survivor or survivors, it being my intention that the surviving child, in case the others die without leaving a living child or children, shall have the whole balance of my estate." The executors, having in their possession a substantial sum of money, petitioned the probate court for an order making a partial distribution, and asking a construction of that clause of the will. The court construed the will and ordered the distribution.

Decree of distribution — construction of will by probate court.

2. The probate court had jurisdiction to construe the will for the purpose of determining to whom distribution should be made. Regular proceeding demands the entry of a decree of distribution by the probate court. That court alone can discharge the executor and determine the devolution of title to the property of the estate. If the executor has transferred property in anticipation of a proper decree, such decree may subsequently be made.

¹Reported in 175 N. W. 105.

When omitted question of law may be decided by supreme court.

3. Where no question of fact is involved, and no appeal is made to discretion, and the question is purely one of law, this court may, with consent of all parties, determine a question not passed on by the trial court.

Will — residuary clause construed.

4. The clause of the will above quoted, construed in connection with the balance of the will, means that, upon the death of one of the testator's children without issue, the others shall take his share, whether such death occur before or after the death of testator.

The executors of the estate of Frank H. Peavey, deceased, petitioned the probate court for Hennepin county for an order making partial distribution of the residuary estate and for the construction of item 36 of testator's will. The petition was heard by Dahl, J., who made findings and as conclusion of law ordered distribution of certain moneys to the beneficiaries. From the order of the probate court construing item 36 of the will, Katherine Jordan Peavey Appleton appealed to the district court for that county. The appeal was heard by Rockwood, J., who reversed the decree of the probate court for want of jurisdiction and remanded the case. From the judgment entered pursuant to the order for judgment, all parties appealed. Reversed.

Frank B. Kellogg, Cordenio A. Severance, George W. Morgan and Richard Reid Rogers, for K. J. P. Appleton.

Lancaster & Simpson, for the executors and daughters of testator.

HALLAM, J.

1. Frank H. Peavey died testate December 30, 1901. He left two daughters and one son. The elder daughter was married to Frank T. Heffelfinger. They then had three children and now have four. The younger daughter was married to Frederick B. Wells. They then had one child and now have four. The son was married to appellant. He died childless in 1913. Appellant has since remarried. Mr. Peavey was engaged principally in the grain and elevator business and was possessed of large wealth. In his will he gave some specific legacies. He created many trusts, in each case directing the deposit of money or securities with a trust company during the life of the beneficiary, and directing that, upon the death of the beneficiary, the securities so deposited should

become part of the residuary estate. He directed that \$200,000 be placed in trust for the benefit of each of his three children, and that, if any child died leaving issue, the fund deposited for his benefit should be paid to such issue; if no issue, then the fund should become part of the residue.

His son and sons-in-law were his partners in the firm of F. H. Peavey & Company. He directed that they continue the business for five years, and that, at the expiration of that time, they form a corporation, to which the executors should transfer all property then belonging to the estate, except that held in trust. He directed that there should be sold to his son and sons-in-law, each, one-third ($1/3$) of the capital stock of the corporation, taking therefor a note payable out of dividends, and that one such note shall be transferred to each of his children so that each should receive, including the \$200,000 placed in trust, \$1,000,000.

The estate has never been closed. In March, 1918, the executors, having in their possession a substantial sum of money, petitioned the probate court for an order making a partial distribution of the residue of the estate, and asking that the court determine the proper construction of "item 36" of the will. Item 36 reads as follows:

"All the balance of my estate I give and bequeath to my beloved wife and to my three children, one-third ($1/3$) to my wife and two-thirds ($2/3$) to my three children, share and share alike, provided, however, that if either of my children shall die without leaving a living child or children, then the share of such child shall become the property of the survivor or survivors, it being my intention that the surviving child, in case the others die without leaving a living child, or children, shall have the whole balance of my estate."

The probate court ordered the distribution and in so doing construed "item 36" to mean that on the death of one child, either before or after the testator, his share of the residue should become the property of the surviving children. Appellant, claiming the share of George W. Peavey as part of his estate, appealed to the district court.

After the conclusion of the argument, the district judge, of his own motion, gave judgment that the decree of the probate court be reversed for want of jurisdiction, and remanded the case with instructions to take

no further proceedings not consistent with such judgment. Both parties appeal.

2. Both parties contend the district court was in error in ruling that the probate court had no jurisdiction. We agree with this contention. The probate court has exclusive jurisdiction over administration of estates. It has exclusive jurisdiction to decree the distribution of an estate. Regular proceeding demands the entry, by the probate court, of a decree of distribution, when property comes into possession of an executor. The probate court alone can determine the devolution of the title to the property of the estate. In *re Scheffer's Estate*, 58 Minn. 29, 59 N. W. 956. See *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792. For the purpose of determining to whom distribution shall be made, the probate court has jurisdiction to construe the will. *Appleby v. Watkins*, 95 Minn. 455, 14 N. W. 301, 5 Ann. Cas. 471. See *Fiske v. Lawton*, 124 Minn. 85, 144 N. W. 455.

The district court apparently understood the law as we do as to these propositions, but was of the opinion that the executors had disposed of all the property of the estate in the manner provided by the will, and that, this having been done, no decree could properly be made. In view of the fact that assets, declared by the will to be part of the residuary estate, are now admittedly in the hands of the executors, and are claimed by legatees as such, it is clear that all property of the estate has not been disposed of. Nor do we doubt that, if an executor transfers property to the party to whom the will directs, in anticipation of a proper decree, such decree may subsequently be made.

3. In view of the fact that the trial court made no decision on the merits, doubt may arise as to the propriety of our determining the merits on appeal. This court is an appellate court, and does not, as a rule, entertain a controversy without a determination by the trial court. In this case no question of fact is involved. No appeal is made to the discretion of the court. The question is one of law, involving a determination of the construction of the language of the will from a reading of the will itself. Both parties urge that the court determine the merits. A majority of the court are of the opinion that we should do so, that, under the conditions mentioned, the principle to be applied is that stated in *Hawke v. Banning*, 3 Minn. 30 (67), and *Babcock v. Sanborn*, 3 Minn.

86, (141) namely, that this court may pass upon questions not determined by the trial court, where it is evident that the record would not be aided by verdict or decision below.

4. Coming to the merits: We agree with the probate court's construction of the will. Counsel for appellant invoke as an aid to the ascertainment of the testator's intention, what they conceive to be the correct rule as follows:

"Where a testator leaves a bequest to A, but if A should die without children, then to B, the testator, in the absence of language or circumstances clearly showing a different intention, is presumed to mean the death of A before that of the testator, so that if A survives the testator, his interest in the bequest becomes absolute."

Counsel for the executors take issue as to the correctness of this rule, and contend that, where such language is used in a will, the court should interpret the devise over as taking effect, according to "the ordinary and literal meaning of the words," upon death at any time, whether before or after the death of the testator. Each contention has the support of much respectable authority. Many of the cases sustaining appellant's contention will be found cited in *Fowler v. Duhme*, 143 Ind. 248, 42 N. E. 623; see also *Lawlor v. Holohan*, 70 Conn. 87, 38 Atl. 903; *Lumpkin v. Lumpkin*, 108 Md. 470, 70 Atl. 238, 25 L.R.A. (N.S.) 1063; *Dameron v. Lanyon*, 234 Mo. 627, 138 S. W. 1; *In re Owen's Will*, 164 Wis. 260, 159 N. W. 906. Some of the most pointed decisions sustaining respondent's contention are *Britton v. Thornton*, 112 U. S. 526, 5 Sup. Ct. 291, 28 L. ed. 816; *Matter of Cramer*, 170 N. Y. 271, 63 N. E. 279; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388.

In many of the cases there were other important, and in some cases, controlling circumstances. Language such as that quoted by appellant's counsel seldom stands alone.

Apparently the majority in number of decisions favor the rule as stated by appellant's counsel. If we had the bald proposition of such a clause entirely uncontrolled by context or other extraneous circumstances, we should be much inclined to follow that rule. It conduces to the early vesting of the legacy, a result which the law justly favors, *Union Mut. Assn. v. Montgomery*, 70 Mich. 587, 38 N. W. 588, 14 Am. St. 519, and

it avoids the complications which in many cases arise from the difficulty of identifying and recalling the property bequeathed after a period of enjoyment by the first legatee. Nor are we unmindful of the rule that, where an estate is bequeathed absolutely to one person, it is not to be diminished or limited by subsequent provisions of doubtful meaning. *Long v. Willsey*, 132 Minn. 316, 156 N. W. 349. But after a careful perusal of the whole will we are of the opinion that when Mr. Peavey willed that "the surviving child, in case the others die without leaving a living child, or children, shall have the whole balance of my estate," he intended to refer to death of children, after as well as before, his own death.

We refer briefly to some of the considerations that lead us to this conclusion.

The court will have regard for the common desire of men to favor with their bounty their own kin. In *re Oertle*, 34 Minn. 173, 24 N. W. 924, 57 Am. Rep. 48; In *re Korn's Will*, 128 Wis. 428, 107 N. W. 659. Mr. Peavey made his own inclination to this purpose clear in many ways.

Under general rules of law, recognized by implication in G. S. 1913, § 7262, had George W. Peavey died without issue, before his father, his residuary legacy would have lapsed in favor of his sisters. 40 Cyc. 1508, 1509. If this was *all* that item 36 meant to accomplish, it accomplished nothing.

The residuary estate disposed of by item 36, consisted mostly of assets which were directed to be deposited with trustees, for the life of specific beneficiaries. Of necessity, therefore, the residuary estate could not come into possession of the residuary legatees until the lapse of a substantial time after the death of the testator.

Some of these trusts were in favor of the children of the testator. It is unlikely that he intended to vest in them, immediately on his death, an interest in these assets, which were not to become a part of the residue until after their death.

One of these trusts was in favor of appellant Appleton. On her death leaving a child by testator's son, the property deposited for this trust was to go to such child, if no such child, then into the residuary estate. It is unlikely that the testator intended that she should nevertheless have a vested interest in that fund.

But resort to these considerations seems unnecessary. When we read items 35, 36, and 37 together, there seems no real doubt as to the meaning of item 36. Item 35 made contingent provision for a second trust of \$100,000 in favor of the testator's wife and children.

Reading items 35, 36 and 37 together, without paragraphing, we have the following:

"In case my estate exceeds the amount of the various bequests above made and the various sums placed with said trust companies * * * then I direct my executors * * * that they place the sum of \$100,000 in trust * * * for each of my three children. * * * At the decease of either of my children * * * the fund placed with said trust companies for said child be paid to the child or children of such deceased son or daughter * * * but if such deceased son or daughter shall have died without leaving a child or children living, then such fund shall become a part of my residuary estate. * * * All the balance of my estate I give and bequeath to my beloved wife and to my three children, one-third ($1/3$) to my wife, and two-thirds ($2/3$) to my three children, share and share alike, provided, however, that if either of my children shall die without leaving a living child or children, then the share of such child shall become the property of the survivor or survivors, it being my intention that the surviving child, in case the others die without leaving a living child or children, shall have the whole balance of my estate. * * * It being my intention to give each of them, including the two hundred thousand dollars (\$200,000) placed in trust for them, the sum of one million dollars (\$1,000,000), if my estate amounts to enough to do so; and if it amounts to more, then I intend them, or the survivors of them as above stated, and their mother, in the proportions above named, to have the balance."

The provision of item 35, that on the death of a child, his issue should take the body of the trust fund deposited for his benefit, but, if such child should die childless, then the fund should pass into the residuum is significant. When, in this connection, the testator willed, that "the surviving child, in case the others die without leaving a living child or children, shall have the whole balance of my estate," and that "I intend them or the survivors of them * * * to have the balance," it seems

very clear that he referred to survivorship of the children as among themselves and not to their survival of himself.

The case will be remanded with directions to the district court to reverse its judgment and affirm the decree of the probate court.

Judgment reversed.

BROWN, C. J. and DIBELL, J. (dissenting).

We dissent from so much of the opinion as holds that the testator's residuary estate did not vest in the devisees named in his will, all of whom survived him, upon his death. The law greatly favors the early vesting of estates. It prefers the disintegration of estates rather than their indefinite perpetuation or contingent vesting. Its policy in this respect largely induced the rule quite generally adopted, and which we approve, that a will making a devise over upon the death of the first taker is to be understood to refer to the death of the first taker if it occurs within the life of the testator, and if the first taker survives the testator the devised estate vests in him absolutely. The rule is applied with the limitation that, if it clearly appears that this was not the testator's intention, and he intended a devise over upon the death of the first taker whether it occurred before or after his own death, his intention is given effect.

The will of Peavey, as construed by the probate court, taking the life expectancies of his three children at his death, postponed the vesting of his residuary estate for many years, and we are not now concerned to inquire whether the devisees of the residuary estate, if it did not vest at his death, could hasten its vesting by agreement. We are not blind to the provisions in the will which give force to the argument that Peavey, after bountifully providing by specific gifts for his blood relatives, kin and others, intended that his residuary estate should go to his blood relatives. All this is fairly and forcefully discussed in the prevailing opinion. But having in mind the guiding rule of construction, we are unable to concur in the view that the testator intended that, as to the residuary estate, the will should not take effect and speak as of the date of his death, and it seems to us that, if he had been advised that the will as written necessarily would exclude his son-in-law and confidential business associate Wells from sharing in the residuary estate, if his wife should die without

issue, it would not have been executed in its present form. The same situation is presented as to his other son-in-law Heffelfinger. Both men sustained close business and personal relations with the testator, and he knew that their efforts in a large measure would contribute to produce the property which ultimately would find its way into his residuary estate which he confidently believed would be of considerable proportions. If the testator would not have excluded either from sharing in his residuary estate, then the construction of the probate court is wrong, for the construction of the will as to the sons-in-law applies to the daughter-in-law.

JAMES L. ANKER v. CHICAGO GREAT WESTERN RAILROAD
COMPANY.

GEORGE C. STILES, INTERVENER.¹

November 28, 1919.

No. 21,447.

Employment of attorney — solicitation by layman for hire.

1. Evidence examined and held sufficient to sustain the finding of the jury, that the action was not procured by plaintiff's attorney by solicitation of a layman for hire.

Attorney and client — contract of employment — increase in compensation.

2. A contract of employment between attorney and client is not invalid for the reason that the amount of compensation was increased by agreement subsequent to the bringing of the action.

After the former appeal reported in 140 Minn. 63, 167 N. W. 278, the case was tried before Hale, J., who when intervener rested denied defendant's motion for a directed verdict upon the ground that he had failed to establish a cause of action, had failed to establish a valid lien upon the cause of action set forth in the intervention complaint, and that as a matter of law it appeared that the main action was solicited by A. A. Roe and therefore invalid and void as against public policy, and a jury which returned a verdict for \$2,382.40. From an order denying its mo-

¹Reported in 174 N. W. 841.

tion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

A. G. Briggs and Charles H. Weyl, for appellant.

D. C. Edwards, George C. Stiles and F. M. Miner, for respondent.

QUINN, J.

This is the second appeal in this case. 140 Minn. 63, 167 N. W. 278. George C. Stiles brought the action as attorney for the plaintiff to recover for personal injuries. After the case was at issue, plaintiff settled with the defendant for \$4,000, without the knowledge of his attorney or payment of his fees. Stiles made application to the trial court to have the case reinstated and for leave to intervene for the purpose of having his right to a lien upon the cause of action and the amount thereof determined. The application was granted and the intervener filed a complaint in intervention. The defendant answered, alleging that the contract of employment between Stiles and the plaintiff was champertous and void as against public policy, because it was procured by solicitation of a layman employed by Stiles. The issue was tried to a jury and a verdict returned in favor of the intervener and against the defendant. From an order denying defendant's motion for judgment notwithstanding the verdict, and if that be denied for a new trial, defendant appealed.

But two questions are presented for consideration: (1) Is the evidence conclusive that the case was so far solicited by the witness Roe, that the contract of retainer is invalid? (2) Is the contract of employment dated December 9 invalid for the reason that it increased the attorney's compensation after the action was commenced?

1. The jury found the contract between plaintiff and the intervener not champertous. We are asked to hold as a matter of law that it was. There was evidence that the attorney procured the case through the solicitation of the witness Roe, a layman whom Stiles employed for that purpose. The plaintiff so testified, and there was testimony in corroboration thereof. Stiles testified that the first he ever heard of the plaintiff or his cause of action, was by a letter which he received early in August, 1916, from a former client by the name of Ben Herr, dated August 2, telling him about the plaintiff's case and that Mr. Anker had requested him to write Mr. Stiles to come and see him about handling his

case; that in response to such letter he sent Mr. Roe to see the plaintiff which led up to his employment. The testimony of Stiles was corroborated by Roe, Herr and Scott, and made a question of fact for the jury as to whether Roe solicited the case for Stiles, in such a manner as to render the contract champertous. The findings of the jury settled the question in favor of the intervener.

2. As to the contract of December 9, 1919, the plaintiff testified that the terms of the contract were talked over between him and Mr. Stiles and that he understood the contract when he signed it. There is no dispute as to the amount agreed upon between the parties thereto. The mere fact that the amount which the attorney was to receive was changed subsequent to the employment does not invalidate the contract.

Affirmed.

K. O. BREKKEN v. A. C. WENZEL.¹

November 28, 1919.

No. 21,490.

What is not an accord and satisfaction.

1. The fact that defendant in making division of a crop added to plaintiff's share, without his knowledge, an additional quantity to satisfy a liability to him did not constitute an accord and satisfaction of such liability.

Refusal of offer — counterclaim.

2. The offer of the grain in satisfaction of the liability, not having been accepted, was not binding, and plaintiff having brought suit on several claims including such liability, defendant is entitled to have the value of the grain offset against whatever amount is due plaintiff.

Action in the district court for Yellow Medicine county to recover \$706.10. The case was tried before Daly, J., and a jury which returned a verdict in favor of defendant. From an order denying his motion for a new trial, plaintiff appealed. **Affirmed.**

Bert O. Loe, for appellant.

Paul D. Stratton, for respondent.

¹Reported in 174 N. W. 831.

TAYLOR, C.

Appeal by plaintiff from an order refusing a new trial after a verdict for defendant.

Plaintiff had leased a farm to defendant for two seasons, and in his complaint set out 11 items or claims growing out of these farming transactions on which he sought to recover. One of these claims was for damages for negligently permitting cattle and hogs to destroy three acres of growing corn. In his answer defendant alleged that he had paid plaintiff more than in full for this damage by giving him 90 bushels more than his share of the corn raised.

The only ground on which plaintiff asks for a new trial is that the court, by its charge, permitted the jury to apply the additional 90 bushels of corn as an offset against the aggregate amount of plaintiff's claims, instead of instructing them that it was delivered in payment of the damages arising out of the destruction of the three acres of growing corn and could only be applied as an offset against that claim.

There is a settled case, but it contains only the charge of the court, an exception to the part of the charge questioned, and a short excerpt of less than two pages from the testimony of defendant. Nothing else, and nothing to show the purport of the other evidence, or that it did not bear on the question sought to be raised.

In his charge, the court, after stating that "there are a great many items involved in dispute here, and it is practically, in a measure, in the nature of an accounting," took up the several items seriatim, and discussed the claims pro and con in respect to them. His statement concerning the item of 90 bushels of corn is not clear, but, giving it the effect claimed by plaintiff, we are of opinion that it does not justify a reversal. In the absence of a record showing otherwise, we must take it for granted that the action was so tried as to warrant the statement of the court that it was in the nature of an accounting, and that all the claims of both parties were litigated and to be determined.

Plaintiff rests his contention on the testimony of defendant that he was "willing to turn over ninety bushels for these three acres," and that in dividing the corn he placed his own in one pile and plaintiff's in another and placed the 90 bushels with plaintiff's share as an "allowance to him for the damages done by hogs and cattle in the cornfield * * *

so as to give him whatever he had coming out of the corn for the destruction." Plaintiff states in his brief that "the evidence is absolutely barren of any claim that plaintiff consented to this arrangement or knew anything about it." As plaintiff did not consent to take this corn in satisfaction of the claim for which it was tendered, delivering it to him in the manner stated did not constitute an accord and satisfaction of the claim. 1 Dunnell, Minn. Dig. § 36. Defendant's offer of the corn in satisfaction of that claim not having been accepted did not become binding, and if plaintiff has the corn, and this seems to be conceded, defendant was entitled to have its value offset against whatever amount was found due plaintiff.

Order affirmed.

ANNIE KESSLER AND ANOTHER v. MATHILDA VON BANK
AND OTHERS.¹

November 28, 1919.

No. 21,512.

Delivery of deed — evidence.

1. Evidence considered and *held* to sustain a finding that a deed, under which plaintiff claims title, was duly delivered.

Admission of evidence.

2. No reversible error was made in the reception of testimony.

Action in the district court for Wright county for the partition of certain premises. The case was tried before Giddings, J., who made findings and as conclusion of law ordered that the partition should be had in the manner stated in the first paragraph of the opinion. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

John P. Nash, William M. Nash and Arthur M. Higgins, for appellants.

S. A. Johnson, for respondents.

¹Reported in 174 N. W. 839.

HOLT, J.

Action to partition a quarter section of land. The appeal is from a decree partitioning the same by drawing a line north and south through the center of the quarter section, giving the defendant Mathilda Von Bank the right to select the tract she desired and awarding her the title thereto, and awarding the other tract to the plaintiff Annie Kessler. Defendants appeal.

On November 25, 1911, Henry Dalheimer, the then husband of defendant Mathilda Von Bank, and the father of plaintiff Annie Kessler and the defendants Edmund, Teresa, and Isabella Dalheimer, was on his death bed in a hospital at Anoka. Annie was by a former wife; the three last named children were by the defendant Mathilda. At the time mentioned a brother suggested that, in view of the near approach of death, it would be advisable to make disposition of his property. He acted on the suggestion, and the clerk of the district court at Anoka was called in to prepare the necessary instruments. Dalheimer owned two mortgages and three pieces of real estate in Wright county. Two of the pieces were small, one of which was the homestead, and the third was the quarter section mentioned. The daughter Annie was then unmarried. Three separate deeds were drawn and executed to Annie as grantee. Assignments of the mortgages to the wife Mathilda were executed. Mr. Hart obtained the description from deeds and mortgages which Dalheimer kept in a small valise in a closet in the room. He was in bed and very weak. The valise was brought out at his request by his wife. When the deeds and assignments had been executed, he sank back on his pillow, and indicated by motion that the instruments be placed in the valise and returned to the closet. Hart was not at the trial. Annie was not present when the instruments were executed. The statute prevented Mathilda from testifying. Dalheimer died on December 7 following.

On the fourteenth of that month his widow and Annie went to a notary public, who at the request of the widow drew two deeds to the two small tracts of land mentioned wherein Annie was grantor and Mathilda grantee. The deeds were executed. Then she gave the notary the three deeds and the two assignments of mortgage drawn by Hart, and executed as above stated, also the two deeds Annie executed, and directed him to record all of them. This was done. Although the record title

thus appears to have been in Annie to the entire quarter section, she alleged in the complaint that she was the owner of an undivided half only, and that the other undivided half was owned by her stepmother, Mathilda Von Bank.

The testimony at the trial indicated that Dalheimer desired to dispose of his property while living, so as to save expense and trouble after his death; that he took the means of transferring, through his daughter Annie, what he intended his wife to have of the real estate, and also that Annie was to have one-half of the quarter section, and all the rest, both personal property and real estate, should go to his wife.

The appeal presents two questions: (1) Were statements of Dalheimer as to his intended disposition of his property admissible? (2) Was there a delivery of the deed to Annie?

It is difficult to see that the testimony objected to has any bearing upon the delivery of the deeds on November 25, 1911. If the deeds were in fact delivered, the title to all his real estate passed absolutely to Annie. But were it otherwise, declarations of intentions to do some act in the future are often admissible to characterize the act when done, and the extent to which such evidence is admissible is largely within the discretion of the trial court. If such declarations are remote from the performance of the act to which they relate, little aid can be had from their admission in evidence. But it is for the trial court to determine when the limit is reached. *Johnson v. Holst*, 86 Minn. 496, 90 N. W. 1115. We perceive no abuse of discretion in the rulings in this case.

The appeal hinges on the fact whether there was a delivery without an actual passing of the instrument from the hand of the grantor to that of the grantee. The intention of the grantor to pass title by the execution and disposition of the deed is of controlling importance. The matter has been often considered in this court. *Conlan v. Grace*, 36 Minn. 276, 30 N. W. 880; *Nazro v. Ware*, 38 Minn. 443, 38 N. W. 359; *Lee v. Fletcher*, 46 Minn. 49, 48 N. W. 456, 12 L.R.A. 171; *Haeg v. Haeg*, 53 Minn. 33, 55 N. W. 1114; *Babbitt v. Bennett*, 68 Minn. 260, 71 N. W. 22; *Barnard v. Thurston*, 86 Minn. 343, 90 N. W. 574; *Chastek v. Souba*, 93 Minn. 418, 101 N. W. 618; *Vessey v. Dwyer*, 116 Minn. 245, 133 N. W. 613; *Ingersoll v. Odendahl*, 136 Minn. 428, 162 N. W. 525. "Delivery to an agent or delivery to a stranger or for record, even if done

without the knowledge of the grantee, is, if followed by his assent, a good delivery." *Gaston v. Merriam*, 33 Minn. 271, 22 N. W. 614. In view of what was said in *Conlan v. Grace*, supra, we may here state that the fact that the deeds, after being signed and acknowledged, were placed at the disposal of and left with Dalheimer's wife, evinced an intention of the parties that they should take effect at once as conveyances. If so there was a sufficient delivery. In the light of the circumstances under which the various instruments drawn by Mr. Hart were executed, we think the court was justified in finding that there was an intention on the part of the grantors (Mr. Dalheimer and his wife) that they should become effective at once. The acts of the widow, the defendant Mathilda, in causing them to be recorded, and taking a conveyance from Annie for two of the three tracts described in the deeds, and Annie's acquiescence, indicate a delivery, and the finding to that effect by the learned trial court cannot be disturbed.

The judgment is affirmed.

STATE v. FRANK VOLK.¹

November 28, 1919.

No. 21,533.

Criminal law—compelling prisoner to plead to new charge.

Where a person is in custody for trial on a criminal charge and a new charge is preferred against him in legal form, of which the court has jurisdiction, the court may require him to plead to such new charge without the formality of the issuance and service of a warrant of arrest.

From a judgment of the municipal court of the city of Mankato, Goff, J., convicting defendant of a violation of a traffic ordinance of that city, he appealed. Affirmed.

Regan & Grogan, for appellant.

Clifford L. Hilton, Attorney General, and *C. E. Phillips*, County Attorney, for respondent.

¹Reported in 174 N. W. 883.

HOLT, J.

Defendant was convicted in the municipal court of Mankato of having violated a traffic ordinance of the city and appeals.

The inference from the settled case is that defendant was in custody on some charge growing out of his operation of a Ford automobile upon the streets of the city on May 3, 1919, his trial having been continued from time to time until May 17, at which time the prosecuting attorney preferred an oral complaint against defendant for having violated said ordinance on May 3, and also moved for a dismissal of the proceeding, whatever it might have been, under which he had theretofore been held. The court thereupon directed an officer to "bring in Mr. Volk," and when he was brought the court said: "Come forward, Mr. Volk." Then he addressed the attorney saying: "Mr. Regan, you are attorney for the defendant, do you plead guilty or not guilty?" Mr. Regan responded: "We want to plead not guilty when the proper time comes, but there is no complaint filed and no warrant issued and we object to the jurisdiction of the court in the matter." Some further talk took place between the court and defendant's attorney, in which the latter moved for postponement to prepare for trial; however, all the time insistently challenging the jurisdiction of the court on the grounds stated.

Without stopping to consider whether the principle applied in *State v. Fitzgerald*, 51 Minn. 534, 53 N. W. 799, should govern here, so that by asking for a continuance he waived the right to raise the question of jurisdiction, we come directly to the only point raised by the appeal, namely: Was the court without jurisdiction of defendant in this case because no warrant had been issued or served therein? No question is made in this court but that the oral complaint made in open court by the prosecuting attorney and entered on its records was as efficacious legally as a formal written verified complaint duly filed. Nor could there well be, for in section 18 of chapter 119, page 358, Sp. Laws 1885, establishing the municipal court of the city of Mankato, it is provided:

"In cases where alleged offenders shall be in custody and brought before the court without process, the clerk shall enter upon the records of the court a brief statement of the offense with which the defendant is charged, which shall stand in place of a complaint, unless the court shall direct a formal complaint to be made."

The defendant here was in custody and was brought before the court without process. The court on the complaint entered had jurisdiction of the offense. "The only function of the warrant in a criminal case is to enable the court to acquire jurisdiction of the person of the defendant by bringing him before the court to answer the charge made against him." *State v. Nugent*, 108 Minn. 267, 121 N. W. 898. In *Commonwealth v. Tay*, 170 Mass. 192, it was said: "In our opinion the court had jurisdiction to try the complaint, whether her original arrest was illegal or was authorized by law. If she was illegally arrested, she had her remedy by action for that wrong, and the illegal arrest did not prevent the court from acquiring jurisdiction to try the complaint." *State v. Brewster*, 7 Vt. 118, and *Dow's Case*, 18 Pa. St. 37, indicate that, where one accused by a valid indictment or complaint of an offense is brought before a court having jurisdiction thereof and is required to plead thereto, he cannot secure his freedom by showing that he was illegally or forcibly brought into court. And it would seem that while a person is in court on trial, and an indictment in the same court is brought in against him upon another charge, he could be immediately arraigned without serving a warrant of arrest upon him.

We think that since the record indicates that defendant was in custody when the charge on which he was tried was preferred he could properly be required to plead without the formality of issuing and serving a warrant of arrest upon him.

The judgment is affirmed.

STATE EX REL. SCHEFFER & ROSSUM COMPANY v. HENRY
KANE AND OTHERS.¹

November 28, 1919.

No. 21,664.

Certiorari — writ from supreme court to justice of peace.

1. Except in special instances and when public interests are involved the supreme court will not issue a writ of certiorari to a justice court, in review of a judgment or order there rendered, but will refer the parties to the court having direct appellate jurisdiction of such court.

¹Reported in 174 N. W. 884.

No writ where statute gives an appeal.

2. Certiorari will not issue to review an order or judgment from which an appeal is given by statute; the remedy by appeal in such case is exclusive.

Garnishment — appeal from judgment by default.

3. Section 7887, G. S. 1913, gives an appeal to the district court from an order made by a justice of the peace under section 7871, denying an application for relief from a default judgment in garnishment proceedings.

Same — stay of proceedings.

4. Such appeal, when taken in the form and manner prescribed for appeals from justice court in civil actions, will stay all proceedings looking to the enforcement of the judgment from which relief is sought pending the appeal.

Upon the relation of Scheffer & Rossum Company the supreme court granted its writ of certiorari directed to Henry Kane, justice of the peace, and others, to review garnishment proceedings had before the justice. Writ discharged.

B. H. Schriber, for relator.

O'Malley & O'Malley, for respondents.

BROWN, C. J.

An action with an accompanying garnishment proceeding was duly commenced before a justice of the peace. The garnishee, though duly served with the summons, failed to appear, and default judgment was rendered against him in the amount of the recovery against defendant in the action. Thereafter the garnishee, upon affidavits tending to excuse the default, moved the justice to be relieved therefrom, with the privilege of making proper disclosure. After due hearing the justice by formal order denied the motion. The garnishee then sued out a writ of certiorari from this court to review the order so made.

The application to the justice was made under the provisions of G. S. 1913, § 7871, which provides generally for relief from default judgments in garnishment proceedings. The statute was treated as applicable to justice courts in Minneapolis, *St. P. & S. S. M. Ry. Co. v. Pierce*, 103 Minn. 504, 115 N. W. 649. Whether the statute can have the same ap-

plication to a justice of the peace as to the district court, we do not stop to consider; the question is not involved. We dispose of the case upon the point that, since an appeal from an order of the kind is expressly given by statute, certiorari is not available and the writ must be discharged, without regard to other questions raised.

Such an appeal is given by section 7887, for it there provides that any party to a garnishment proceeding, deeming himself aggrieved, may appeal from an order or final judgment from a justice of the peace to the district court, or from the district court to the supreme court, in the manner and with like effect as in civil actions. That necessarily includes an order made under section 7871 which grants or refuses an application for relief from a default judgment. It is well settled that certiorari cannot be resorted to in review of orders or judgments of inferior courts where there is a remedy by appeal. *State v. Hanft*, 32 Minn. 403, 23 N. W. 308; *State v. Olson*, 56 Minn. 210, 57 N. W. 477. The suggestion of relator that the statute should be construed to apply to orders made before judgment is not sound. The statute does not so read, on the contrary grants the right of appeal from any order made in such proceedings. That of course means any appealable order. This order was appealable.

The appeal when properly taken in such case, with the required bond, will stay all proceedings in the justice court precisely as an appeal so operates in the ordinary civil action.

This disposes of the case, and precludes the consideration of other questions. But in taking leave of the matter we take occasion to say, that in the future the supreme court will issue a writ of certiorari to a justice of the peace only in exceptional cases and where public interests are in some way involved. When no appeal is given in a particular action or proceeding from that court and certiorari is an available remedy, application should be made to the court having direct appellate jurisdiction of the particular justice court. We adopt this rule as in harmony with orderly practice in such matters.

Writ discharged.

JOHN NEELUND v. H. C. HANSEN AND ANOTHER.¹

December 5, 1919.

No. 21,347.

Fraud — unintentional misrepresentation.

1. A false representation made by a party having no interest in the transaction to which the statement relates, is not sufficient to sustain an action for deceit, if the party does not know that the statements are false and honestly intends to tell the truth.

Intent to deceive — charge to jury.

2. An instruction to the jury, that there must have been an intention on the part of the defendant to deceive or there can be no recovery, was not error under the facts in this case.

Evidence of fraud insufficient.

3. Evidence considered and *held* sufficient to justify the verdict.

Action in the district court for Carlton county to recover \$5,157.38. Among other matters the answer expressly denied that defendant Hansen made any representation whatsoever to plaintiff that he knew that the contract when signed by Shillin was valid and sufficient to convey a good and absolute title to plaintiff to the property described, upon payment of the amount therein specified. The case was tried before Fesler, J., and a jury which returned a verdict in favor of defendants. Plaintiff's motion for a new trial was denied. From the judgment entered pursuant to the verdict, plaintiff appealed. Affirmed.

John Jenswold and John D. Jenswold, for appellant.

H. S. Lord and J. E. Green, for respondents.

QUINN, J.

Action to recover damages for deceit, alleged to consist of false statements made by the defendant Hansen to the plaintiff with reference to the legal sufficiency of a certain contract to convey title to real property. The cause was tried to a jury and a verdict returned in favor of the defendants. From a judgment entered thereon plaintiff appealed.

¹Reported in 175 N. W. 538.

Frank Shillin held a contract for a deed from one Ziebler to certain real property in the village of Barnum, a portion of which constituted his homestead. He entered into negotiations with the plaintiff to exchange the same for a farm. They finally arrived at a bargain and the plaintiff paid a portion of the boot money which he was to give. On the following day, June 12, 1913, the parties went to the defendant bank to close the deal. They requested Hansen to draw the papers. The bank held Shillin's contract with Ziebler as collateral, and Shillin requested that the bank instead of himself be named as grantee in the deed to the farm. A deed to the farm, in which the bank was named as grantee, was prepared by Hansen, subject to certain mortgages thereon. The plaintiff, his wife joining, duly executed this deed, and it was left with the bank as collateral in lieu of the Ziebler contract. At the same time a contract was prepared, by the terms of which Shillin was to convey to plaintiff title to the Ziebler property, the deed to be delivered upon certain payments being made as provided in the contract. Shillin executed this contract, but his wife being insane did not join therein. The plaintiff made several payments on the contract, which were applied thereon and as well upon the Ziebler contract, but finally defaulted. There was a balance still owing on the Ziebler contract and it was foreclosed. The plaintiff did not redeem from the foreclosure sale and failed to obtain title to the property. He then brought an action, in which he prevailed, to set aside the deed to the farm which he had given.

In his complaint the plaintiff alleges, in substance, that the defendant Hansen, at the time of the execution of the deed and contract on June 12, for the purpose and with the intention of inducing plaintiff to rely thereon and to induce him to make and deliver the deed to his farm and make said exchange, did falsely state and represent to him that he knew that said contract when signed by Shillin was valid and sufficient to convey a good and absolute title to the plaintiff of the property therein described, and that plaintiff could rely thereon. That plaintiff believed such statements to be true, and was without any notice or knowledge of any of the laws of the state of Minnesota pertaining to such transactions, and without any knowledge whether Shillin was a married man or whether his wife was insane, and that he relied upon all of the statements

which the defendant so made and was thereby deceived to his damage, etc.

It is contended on behalf of the appellant, that the trial court erred: (1) In charging the jury that there must have been an intention on Hansen's part to deceive or there can be no recovery; (2) in denying plaintiff's motion for a new trial, because the verdict is not justified by the evidence and is contrary to law.

Hansen was president of the bank. He was not a lawyer, nor was he particularly skilled in drafting papers or in passing upon the validity thereof. Each of the parties paid him one dollar for his services. He was not otherwise concerned in the transaction. Under such circumstances he owed to the plaintiff no higher duty than to act honestly and in good faith. He must not intentionally mislead, but, if he acts and answers honestly to the best of his ability, he does his whole duty. In such case a less degree of care is required than where one makes a statement for a consideration as a part of a contract. In the latter case, it is his duty to be accurate, and ignorance or mistake will not relieve him from liability. *Jacobson v. Chicago, M. & St. P. Ry. Co.* 132 Minn. 181, 156 N. W. 251, L.R.A. 1916D, 144, Ann. Cas. 1918A, 355.

While the bank held the Ziebler contract as collateral and subsequently received the deed to the farm in lieu thereof, this of itself is not sufficient to take the case out of the rule which is particularly applicable to representations made by third parties who have no interest in the transaction to which the statements relate, "that one is not guilty of fraud which will sustain an action for deceit, if he does not know that his statements are false, and honestly intends to tell the truth." 12 R. C. L. 349, § 104; *Nash v. Minnesota Title Ins. & Trust Co.* 163 Mass. 574, 40 N. E. 1039, 47 Am. St. 489, 28 L.R.A. 753.

The court instructed the jury that, in order to entitle the plaintiff to recover, it must appear that, "when Hansen made that representation, if he did, he intended to deceive Neelund, that is, he intended to induce Neelund to act in reliance upon it and deed away his farm property in order to get the Barnum property. There must have been an intention on Hansen's part to deceive." It is upon this instruction that the appellant alleged error in his motion for a new trial.

To determine whether there is liability in an action for deceit, the

test is, whether the defendant has by act or omission disregarded his duty. To prevent a false statement from being fraudulent, there must have been an honest belief in its truth. One who knowingly asserts that which is false has obviously no such honest belief. The instruction given left it to the jury to say whether Hansen, for the purpose and with the intention of inducing plaintiff to make and deliver the deed to his farm and to make said exchange, did knowingly falsely state and represent to him that he knew that the contract was valid and sufficient to convey a good title to the property therein described, or whether he honestly believed such statements to be true. We think the question was fairly submitted to the jury. The evidence in the case is quite voluminous, but, after reading and considering it with care, we are of the opinion that it fails to show that Hansen's statements were fraudulently made, that is, made with intent to deceive, or that he did not believe them to be true.

The case of *Busterud v. Farrington*, 36 Minn. 320, 31 N. W. 360, is not in point. The liability of a disinterested third person for representations which turn out to be untrue was not there involved. The representations there the subject matter of the action, were made by one of the parties to the transaction and such was the foundation of the decision rendered.

Judgment affirmed.

WILLIAM G. ROERIG v. JAMES G. HOUGHTON, INSPECTOR
OF BUILDINGS OF THE CITY OF MINNEAPOLIS,
AND ANOTHER.¹

December 5, 1919.

No. 21,400.

Municipal corporation — liability to third person because of judicial proceeding.

Neither a municipal corporation nor its administrative officers are liable in damages suffered by third persons in consequence of judicial proceedings conducted in behalf of the municipality in the exercise of its governmental functions.

¹Reported in 175 N. W. 542.

Action in the district court for Hennepin county to recover \$1,615. The facts are stated in the opinion. The case was tried before Steele, J., who when plaintiff rested denied defendants' motion for judgment of dismissal, and a jury which returned a verdict for \$930. From an order denying their motion for a new trial, defendants appealed. Reversed.

C. D. Gould and R. S. Wiggin, for appellants.

Rose & Brill, for respondent.

LEES, C.

Defendant Houghton is building inspector of the city of Minneapolis. Plaintiff, a lot owner, applied to him for a permit to erect an apartment house on his lot. The application was denied and he brought an action to compel Houghton and the city to issue the permit. They answered and he demurred, and on November 8, 1916, his demurrer was sustained. The city council then adopted a resolution directing the city attorney to appeal. The resolution provided that, if he could not procure a waiver of a supersedeas bond, the proper city officials should execute such bond in behalf of the defendants. Thereafter the attorneys for the parties entered into a stipulation, the material portions of which are as follows:

"It is hereby stipulated * * * that a stay of all proceedings * * * until the conclusion of the appeal of defendants in the supreme court, may be granted by the district court, without the filing of the cost or supersedeas bonds required by sections 8002 and 8003 of the General Statutes of Minnesota, 1913, and the filing of such * * * bonds is * * * expressly waived by the plaintiff without, however, waiving right to costs and damages, to which plaintiff would be entitled if such bonds had been given."

A stay was entered and an appeal taken November 13, 1916. On May 11, 1917, this court affirmed the order appealed from. *State v. City of Minneapolis*, 136 Minn. 479, 162 N. W. 477. The case being remanded, findings were made and filed in the district court with an order for judgment, and on May 31, 1917, judgment was entered and a writ of mandamus issued, directing defendants to issue the building permit. On July 6, 1917, one was issued, under which plaintiff built on his lot. The present action was brought to recover damages for the delay in the build-

ing operations from November 13, 1916, to May 31, 1917, due to the stay of proceedings while the appeal was pending. There was a trial by jury and a verdict for plaintiff for \$930. Defendants appeal from a denial of a new trial, and contend: (1) That a municipal corporation is not required to give a bond on appeal; (2) that the city attorney, by signing the stipulation, could not enlarge the city's common-law liability for damages in case it failed in its appeal; (3) that the plaintiff did not prove any damages which were properly allowable.

The question presented by the second contention alone requires attention, for the necessary answer thereto results in a reversal on the merits of plaintiff's claim and terminates the litigation.

In the consideration of the question we assume, without so deciding, that the stipulation above recited amounted to an agreement between the parties which, in effect, subjected defendants to the same liability for damages as would exist had a supersedeas bond been given, and the question presented may be thus stated: Is a municipal corporation, or one of its officers, liable, in the absence of a statute imposing liability, for damages sustained by an applicant for a license or permit in consequence of a refusal to grant it or as a result of judicial proceedings had in contesting the right of the applicant to it?

It is well settled that a municipal corporation cannot be held in damages for the manner in which it exercises its discretionary powers of a public, legislative or quasi-judicial nature. While engaged in the discharge of duties imposed upon it, from the performance of which it derives no compensation or benefit in its corporate capacity, it is clothed with the immunities of the state. *Bryant v. City of St. Paul*, 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31; *Lane v. Minn. State Agricultural Soc.* 62 Minn. 175, 64 N. W. 382, 29 L.R.A. 708; *Ackeret v. City of Minneapolis*, 129 Minn. 190, 151 N. W. 976, L.R.A. 1915D, 1111, Ann. Cas. 1916E, 897.

The ordinance prohibiting the erection of certain classes of buildings in the residential districts of Minneapolis was enacted in the exercise of the city's governmental powers as a political subdivision of the state. It was a regulation made by virtue of the police power of the city. *State v. Houghton*, 134 Minn. 226, 158 N. W. 1017, L.R.A. 1917F, 1050; *State v. Houghton*, 142 Minn. 28, 170 N. W. 853. The police regulations of a

city are made and enforced in the interests of the public, hence it is not liable for the acts of its officers in attempting to enforce them. *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812; *Claussen v. City of Luverne*, 103 Minn. 491, 115 N. W. 643, 15 L.R.A.(N.S.) 698, 14 Ann. Cas. 673. The cases are collected in a note to *Bond v. Royston*, 18 L.R.A.(N.S.) 409, and in *Hershberg v. Barbourville*, 34 L.R.A.(N.S.) 141. Liability of a municipal corporation is not created because the acts of its officers were done under a void ordinance, if the ordinance was enacted in the exercise of governmental powers. *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1; *Bond v. Royston*, *supra*. Neither is it liable for damages sustained by reason of a wrongful revocation of a license or permit. *Lerch v. City of Duluth*, 88 Minn. 295, 92 N. W. 1116; *Claussen v. City of Luverne*, *supra*; *Kansas City v. Lemen*, 57 Fed. 905, 6 C. C. A. 627. It seems clear that the city could not be held at common law for any damages suffered by plaintiff by reason of any of its acts in contesting plaintiff's right to a building permit, and its officers are without authority to charge it with liability by contract.

Houghton's liability stands upon a somewhat different footing. A public officer whose functions are judicial or quasi judicial cannot be called upon to respond in damages for the honest exercise of his judgment within his jurisdiction, however erroneous his judgment may be. *Stewart v. Case*, 53 Minn. 62, 54 N. W. 938, 39 Am. St. 575; *Mechem*, Pub. Off. § 636. If, however, he exercises ministerial powers only, he does not come within this rule and is liable to one who sustains an injury by his malfeasance, misfeasance or nonfeasance. *Rosenthal v. Davenport*, 38 Minn. 543, 38 N. W. 618; *Selover v. Sheardown*, 73 Minn. 393, 76 N. W. 50, 72 Am. St. 627; *Foster v. Malberg*, 119 Minn. 168, 171, 137 N. W. 816, 41 L.R.A.(N.S.) 967, Ann. Cas. 1914A, 1116; *Howley v. Scott*, 123 Minn. 159, 143 N. W. 257, 51 L.R.A.(N.S.) 137; *Tholkes v. Decock*, 125 Minn. 507, 147 N. W. 648, 52 L.R.A.(N.S.) 142; *Mechem*, Pub. Off. § 664; *Throop*, Public Officers, § 724.

But there is a well recognized qualification of the rule last stated. A public officer or agent, engaged in the performance of a public duty in obedience to the command of a statute, should not suffer personally for an error of judgment. The judicial character of his act rather than the judicial character of his office furnishes the basis for the exemption, if

he is exempt. But the qualification applies to all acts done exclusively for the public interest by officers or agents appointed by public authority, provided their acts are within the scope of that authority. *Valentine v. Englewood*, 76 N. J. Law, 509, 71 Atl. 344, 19 L.R.A.(N.S.) 262, 16 Ann. Cas. 731; *Becks v. Dickinson County*, 131 Iowa, 244, 108 N. W. 311, 6 L.R.A.(N.S.) 831, 9 Ann. Cas. 812; 2 *McQuillin, Mun. Corp.* § 536. In *Packard v. Voltz*, 94 Iowa, 277, 62 N. W. 757, 58 Am. St. 396, it was said that it would be an anomaly to exempt a municipality from liability upon the ground that it was acting for the public welfare, and at the same time affix liability upon its agent for precisely the same acts done under express authority. It may be that Houghton was a ministerial officer, but, in passing upon plaintiff's application for a building permit, he was called upon to act in a quasi-judicial capacity, within the scope of his authority and exclusively for the public interest, and is, therefore, exempt from liability to plaintiff for damages suffered in consequence of the judicial proceedings which followed the refusal to issue the permit.

We conclude that plaintiff cannot recover damages either from the city or from Houghton, and that the order denying a new trial must be and it hereby is reversed.

DIBELL, J. (dissenting).

The action is on contract. A consideration of the liability of a municipality for injury which it occasions in the discharge of its governmental functions is not helpful. The situation is clearly and fully stated in the prevailing opinion. It was just this: In the mandamus proceeding the city was defeated. The plaintiff was entitled to a peremptory writ. The defendant wanted to appeal and wanted a stay. The common council, by a formal resolution, authorized the city attorney to appeal and to procure a supersedeas bond, unless the plaintiff would consent to waive it. The purpose of the bond was to get a stay. The plaintiff waived the bond, upon request of the city, retaining by the terms of the stipulation the right to his costs and damages as if a supersedeas bond were given. A stay was entered.

The understanding between the plaintiff and the city was definite. There was to be no supersedeas bond, but the plaintiff was to have his

damages from the city, in the event of an affirmance, just as if there were. There was no lack of consideration. Each was giving and each was getting. There was no question of the city attorney's authority to procure a waiver of a supersedeas bond and enter into the stipulation. The council gave authority. There was no question of fact for the jury upon the meaning of the stipulation, or of the sufficiency of the consideration for it, or of the authority of the city attorney. If the jury is right, the plaintiff sustained damages by the appeal amounting to \$930. The city agreed to pay. By the repudiation of its promise, now sanctioned, it escapes liability and the plaintiff bears his loss. This seems to me all wrong and so I dissent.

On December 19, 1919, the following opinion was filed:

PER CURIAM.

In denying the respondent's application for a rehearing in this case, we take occasion to call attention to the last clause of section 8237, G. S. 1913, where it is provided that no appeal bond need be given by a municipality in appeals to the supreme court. We adhere to the holding that neither a municipal corporation nor its officers are liable for damages suffered in consequence of judicial proceedings conducted by or in behalf of the municipality in the exercise of its governmental functions.

STATE BANK OF READING v. M. RONAN.¹

December 5, 1919.

No. 21,449.

Assignment of error based on charge to jury.

1. Error cannot be assigned in this court upon the instructions to the jury, unless exceptions are taken upon the trial or by a motion for a new trial.

Dismissal of action.

2. Defendant was not entitled to a dismissal when plaintiff rested.

Ruling of trial court.

3. No ruling prejudicial to defendant was made in the trial.

¹Reported in 174 N. W. 892.

Action in the district court for Nobles county to recover \$3,035.70 upon defendant's check. The case was tried before Nelson, J., who when plaintiff rested denied defendant's motion to dismiss the action, and a jury which returned a verdict for \$3,141.96. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

J. A. Cashel, for appellant.

E. J. Jones, for respondent.

HOLT, J.

On May 10, 1918, defendant drew a check upon the plaintiff bank for \$3,035.70, payable to the order of Ed. Kizer, and delivered it to Kizer in payment of cattle bought. It is alleged that Kizer on the same day for value sold and indorsed the check to the First National Bank of Wilmont; that two days later the Wilmont bank for value sold and indorsed the check to the State Bank of Worthington; that the latter bank, in turn, for value sold and indorsed the check to plaintiff on May 23, 1918; that when plaintiff received the check defendant did not have sufficient funds on deposit with plaintiff to pay the same, and that thereupon plaintiff presented the check to defendant, who directed plaintiff to hold it, and agreed to deposit sufficient funds within a reasonable time to pay it. The answer alleged that Kizer had falsely stated to defendant's agent that the agreed purchase price for the cattle was the amount of the check, whereas in fact it was much less, and that defendant stopped payment of the check before it had been charged to his account or paid by plaintiff. There was a verdict for plaintiff, upon which judgment was entered and defendant appeals.

There was no exception taken to any part of the charge when it was given, and the only way in which the court's instructions could thereafter be questioned would be by a motion for new trial under section 7830, G. S. 1913. There was no motion for a new trial. "An assignment of error, based upon the charge, is not considered, unless an exception is taken at the trial, or there is a specification of error in the motion for a new trial." *Ogren v. City of Minneapolis*, 121 Minn. 243, 141 N. W. 120. The charge as given must therefore be accepted as the law of the case, and under that law the verdict is justified by the evidence.

When plaintiff rested there was a motion to dismiss and an exception

saved. Defendant was not entitled to a dismissal. Under the case made by plaintiff, the jury could well find that when the check was presented the defendant did not have sufficient funds to meet it, and when his attention was called thereto he requested the check to be held a couple of days to enable him to make a deposit to take care of it, and that it was customary for defendant and his employee to make similar requests and keep the promises made in regard to the same.

The only other assignment of error open to review is upon the court's refusal to strike out an answer given by defendant's cashier as to what defendant's employee, in charge of his business, said when the check was there presented on May 24, 1918. The question was: "What was said about the check?" The answer was: "He told me that they would have funds in the course of a couple or three days to take care of that check, and advised me to hold it." Then defendant's counsel said: "Objected to and move to strike it out unless he shows that this agent had any authority to borrow money by this form of overdraft." To this ruling there was an exception, but after two or three more questions this occurred:

"Did Paul Wassmund (defendant's employee) say anything about the check not being all right?"

A. "He did not."

Q. "Just merely told you to hold it, and that there would be funds there in a few days to meet it?"

A. "Yes, sir."

The attorney for defendant then stated: "Objected to as leading, and move to strike it out."

There was no exception to this ruling refusing to strike the answer. Later in the trial evidence was given that both defendant and his employee had, on several occasions, preferred similar requests to the bank to hold checks representing overdrafts on defendant's deposit account until further deposit could be made; that plaintiff had so held checks drawn by them, and that deposits had been made to take care of such checks. It also appeared that the employee named was in charge of defendant's place of business and drew and issued checks on defendant's deposit account with plaintiff. No further motion to strike out the testimony as to what Paul Wassmund said when the check was presented was made. From the above statement it is clear that no prejudicial er-

ror can be based on the ruling referred to, even were it conceded that the answer when given should have been stricken.

The judgment must be affirmed.

PETER SEASTRAND v. D. A. FOLEY & COMPANY.¹

December 5, 1919.

No. 21,472.

Judgment — construction of contract final — act of legislature.

1. Where a court by its judgment, determines the construction of a contract between the parties, that construction is final and cannot again be made the subject of litigation between them. The legislature cannot, by subsequent enactment, change the rights of the parties under the contract.

Money had and received—action not barred by former judgment.

2. A judgment does not affect after acquired rights nor preclude a party from availing himself of them. An action for money had and received, to recover money received by defendant after judgment in a former action between the same parties, is not barred by the former judgment, unless the principle on which plaintiff now seeks to recover was determined adversely to plaintiff.

Same—complaint sufficient.

3. The complaint states a cause of action for money had and received. The gist of this action is that defendant, upon the facts of the case, has received money which, by the ties of natural justice and equity, he should pay to plaintiff.

Same—title to money.

4. It is not necessary that plaintiff should ever have had the so-called legal title to the money. The one essential condition is that, in equity and good conscience, it belongs to plaintiff.

Same—recovery of extra work by subcontractor.

5. Plaintiff, a subcontractor, in good faith performed extra work in construction of a drainage ditch. He sued defendant, the contractor, for the price of the extra work. The court held that the amount of extra work was in excess of what the county could pay under the law,

¹Reported in 175 N. W. 117.

and that defendant's contract did not obligate it to pay plaintiff therefor. Later a law was passed, permitting such payment, and the county then made payment to defendant for the full value of the work performed by plaintiff. *Held* that plaintiff may recover in an action for money had and received.

Judgment in prior action.

6. The judgment in the former action did not determine that plaintiff had no right of action under such circumstances.

Action transferred to the district court for Aitkin county to recover \$2,436.75. The facts are stated in the opinion. From an order, Fesler, J., sustaining defendant's demurrer to the complaint, plaintiff appealed. Reversed.

Wright & Wright, for appellant.

Washburn, Bailey & Mitchell, for respondent.

HALLAM, J.

The complaint alleges: In 1912 Aitkin county let a contract to defendant for the construction of a drainage ditch. Defendant was to excavate 158,545.06 cubic yards of earth, at 13 cents a cubic yard, with stipulated amounts for bridges and other work, making the total consideration \$25,526.86. Defendant sublet the work to plaintiff, at 9¾ cents a cubic yard for excavation, and the same stipulated price for bridges and other work, the consideration amounting in the aggregate to \$20,324.14. Defendant further agreed to pay plaintiff for excavation of extra yardage required to be done by the engineer in charge 9½ cents per cubic yard. During the progress of the work the engineer directed plaintiff to perform certain extra work, and this extra work, computed on the terms of plaintiff's contract, amounted to \$5,589.68. The county could pay, under the drainage law, for extra work, a sum not in excess of ten per cent of the original contract price. The county paid to the defendant the price specified in its contract with defendant plus ten per cent, and, in addition thereto, the sum of \$600.27. Defendant paid plaintiff the price stipulated in the contract between them and also all but \$32.52 of the ten per cent that defendant received from the county for extra work. Plaintiff had, therefore, performed extra work for which it had not been paid of the value, at the price stipulated in his contract, of \$3,069.54,

and he brought a former action against defendant to recover that amount. This court held that plaintiff was entitled to recover his contract price, plus the ten per cent which defendant could under the law receive from the county, and plus also the additional \$600.25 which defendant had in fact received from the county, *Seastrand v. D. A. Foley & Co.* 135 Minn. 5, 159 N. W. 1072, and judgment was rendered accordingly. This judgment was paid and satisfied January 1, 1917.

Thereafter the legislature of Minnesota passed a law, chapter 269, page 406, Laws of 1917, under which the county was empowered, but not required, to make payment for the unpaid portion of said extra work, and, on November 24, 1917, the county paid to defendant the sum of \$4,307.13, making the full value of said extra work. This action was brought to recover from defendant the sum of \$2,436.75, the balance of the value of the extra work, computed at the price per yard specified in plaintiff's contract with defendant. The court sustained a demurrer to the complaint, holding that it failed to state a cause of action.

The trial court was of the opinion, as indicated by a memorandum filed, that the judgment in the former action, denying the right of plaintiff to recover more than the amount above stated, is *res adjudicata*, and on that ground sustained the demurrer to the complaint.

1. If this were an action to recover under the terms of the original contract, it might be difficult to avoid the result arrived at by the trial court. In the former action the court construed plaintiff's contract with defendant, and held that it did not contemplate the doing of any extra work except within the ten per cent which the county might pay under the drainage law. The determination that this was the proper construction of that contract is final and cannot again be made the subject of litigation between the parties, and the legislature could not, by subsequent enactment, change or enlarge the rights of plaintiff under the contract. *State v. McDonald*, 26 Minn. 145, 1 N. W. 832; *King v. Dedham Bank*, 15 Mass. 446, 8 Am. Dec. 112.

2. But we do not view this action as one to recover under the original contract. It is rather, as plaintiff contends, an action to recover on the theory that, since the former judgment was rendered, defendant has received money which, in equity and good conscience, it ought to pay to plaintiff, that is, an action for money had and received. If it can be sus-

tained on this theory the former judgment is not a bar, unless the principle on which plaintiff now seeks to recover was determined adversely to plaintiff. A party may not litigate the same cause of action twice with the same adversary. The preclusion applies to all matters which existed at the time of the giving of the judgment and which the party had an opportunity to bring before the court. But, in order that the prior adjudication shall be an estoppel, the question at issue must be the same. A judgment never affects after acquired rights nor precludes a party from availing himself of them. The judgment is conclusive only upon matters as they exist at the time of its rendition. *State of Wisconsin v. Torinus*, 28 Minn. 175, 9 N. W. 725. It is the receipt of money in November, 1917, long after the former judgment was rendered, that forms that basis of this action, if the complaint states a cause of action at all.

3. We think the complaint does state a cause of action for money had and received. The principles that underlie the action for money had and received have never been better summarized than they were by Lord Mansfield, in *Moses v. MacFerlan*, 2 Burr. 1005, in 1760. It was said, in substance, that if the defendant be under an obligation from the ties of natural justice to refund, the law gives the action, founded in the equity of the plaintiff's case, as it were upon a contract ("quasi ex contractu," as the Roman Law expresses it). This species of assumpsit, it was said, lies in numberless instances for money the defendant has received from a third person; which he claims title to, in opposition to plaintiff's right; and which he had, by law, authority to receive from such third person. It lies for money "got through imposition (express, or implied);" or "an undue advantage taken of the plaintiff's situation." "In one word the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

The best considered modern cases adhere to this broad view. In *Highway Commissioners v. Bloomington*, 253 Ill. 164, 97 N. W. 280, Ann. Cas. 1913A, 471, it was said that the obligation arises not from consent, as in the case of contracts, but from the law or natural equity. None of the elements of a contract are present. The intention of the parties is entirely disregarded, while in contract, express or implied, intention is of the essence of the transaction. In the case of contracts the agreement

defines the duty. In this class of cases "the duty defines the contract." The right to recover, it was said, is governed by principles of equity. The action is maintainable in all cases where one person has received money or its equivalent under such circumstances that in equity and good conscience he ought not to retain it, and which *ex aequo et bono* belongs to another. See also Keener, *Quasi-Contracts* 19, 20. Substantially the same principles have been applied in this state. *Brand v. Williams*, 29 Minn. 238, 13 N. W. 42; *Todd v. Bettingen*, 109 Minn. 493, 124 N. W. 443; *Heywood v. Northern Assurance Co.* 133 Minn. 360, 158 N. W. 632, Ann. Cas. 1918D, 241.

There has been some disposition to narrow the application of this form of action and to limit it to the cases to which it has previously been applied. See, for example, *Sergeant v. Stryker*, 16 N. J. Law, 464, 32 Am. Dec. 404. But we will do well not to restrict the scope of a remedy which was intended to relieve against the too narrow procedure of the law. The remedy is now neither legal nor equitable, since under the code neither legal nor equitable remedies longer exist, but in its inception it was regarded as equitable in spirit, *Dresser v. Kronberg*, 108 Me. 423, 81 Atl. 487, 36 L.R.A.(N.S.) 1218, Ann. Cas. 1913B, 542, as resembling a bill in equity, *Osborn v. Bell*, 5 Denio, 370, 376, 49 Am. Dec. 275, as an action at law, equitable in nature, *Northrop's Exrs. v. Graves*, 19 Conn. 548, 50 Am. Dec. 264. As above stated, it is not necessary that there be contract, privity or promise. It is not necessary that the party from whom defendant received the money intended it for plaintiff's benefit. *Brand v. Williams*, 29 Minn. 238, 13 N. W. 42.

4. In some cases there is language to the effect that the money received must be the money of plaintiff. *Grand Lodge A. O. U. W. v. Towne*, 136 Minn. 72, 161 N. W. 403, L.R.A. 1917E, 344. But from this it must not be understood that the money must have been money which plaintiff ever had or the proceeds of property or the issue of a fund which plaintiff ever possessed, *Heywood v. Northern Assurance Co.* 133 Minn. 360, 158 N. W. 632, Ann. Cas. 1918D, 241, or money to which the plaintiff ever had the so-called legal title. The one essential is that the money in equity and good conscience belongs to plaintiff.

5. This essential condition is fulfilled if the facts are as alleged in the complaint in this case. The fact that stands boldly out is that defendant

has received money in payment for work which plaintiff in good faith performed and for which plaintiff has not been paid. Yet defendant retains the money. If it pays to plaintiff the amount he earned it has lost nothing, but, on the contrary, still has a comfortable profit of \$1,860.38, by reason of work done wholly by plaintiff and even without its knowledge. That the county board could have contemplated that defendant should retain the whole amount and deny participation to plaintiff, who did the work, seems inconceivable. Surely an action should lie and we hold an action does lie.

6. The judgment in the former action did not determine that an action does not lie under this state of facts. On the contrary, it was determined, inferentially at least, that an action does lie. The item of \$600.25 recovered in that action was allowed, not on the theory that the contract required it, for the court distinctly held that the contract did not require it, but on the theory that defendant had received this amount on account of the extra work done by plaintiff, and that in justice it should pay the amount over to plaintiff. We are unable to discover any distinction between the right of plaintiff to demand the item of \$600.25 and his right to demand the amount later received up to the value of the work which plaintiff performed.

Order reversed.

THE MINNESOTA LOAN & TRUST COMPANY, AS EXECUTOR
OF THE WILL OF C. H. PETTIT, DECEASED v. DEB-
ORAH M. PETTIT AND ANOTHER.¹

December 5, 1919.

No. 21,475.

Will contest — executor not entitled to recover expenses.

An executor nominated in a will, though acting in good faith, is not entitled to reimbursement out of funds of the estate for his services, expenses and attorney's fees, in an unsuccessful effort to sustain the will upon appeal, against a contest by the widow and sole heir, on the ground that the will is void under the statute.

¹Reported in 175 N. W. 540.

After the decision reported in 135 Minn. 413, 161 N. W. 158, mentioned in the fifth paragraph of the opinion, the executor filed in the probate court for Hennepin county its second supplement to its final account. The widow and daughter filed objections to the items mentioned in the sixth paragraph of the opinion. From that part of the order of the probate court, Dahl, J., disallowing the items for legal services, for services of executor, and for expense of administration and court fees, except \$51, the executor appealed to the district court for that county. The widow and daughter also appealed. The appeal was heard before Steele, J., who made findings and as conclusion of law found that the executor was not entitled to charge the estate or the funds thereof with any of the items or disbursements objected to, that all of such disbursements and charges should have been disallowed and the order of the probate court modified so as to include in disallowed items the amount of \$1,800 allowed, and in all other respects affirmed the order of the probate court. The executor's motion to amend the findings of fact was denied. From the judgment entered pursuant to the order for judgment, the executor appealed. Affirmed.

Cobb, Wheelwright & Dille and J. M. Martin, for appellant.

James E. O'Brien, for respondents.

QUINN, J.

Curtis H. Pettit died intestate May 11, 1914, at his home in Hennepin county, leaving him surviving his widow, Deborah M. Pettit, and their only child, Bessie P. Douglas, who had three minor children. He left a large estate consisting of valuable stocks, bonds, real estate and mineral interests in northern Minnesota, from which large royalties were derived. His will was dated January 22, 1908, in which appellant was nominated executor and trustee. By the terms of the will the entire estate, aside from household furniture, wearing apparel and personal effects, \$2,000 for the upkeep of the lots in the cemetery, and \$1,000 to a servant, was bequeathed and devised to appellant in trust, to hold, manage and control during the life of his wife, their daughter, her husband and their three children and for 20 years after the death of the survivor of them, when the trustee was to turn over the property and net accumulations thereto to the children of the three children of Mrs. Douglas.

At the time of the execution of the will, Mrs. Pettit indorsed thereon her consent to the provisions thereof. On May 15, 1914, Mrs. Douglas presented the will to the probate court of Hennepin county, and asked that it be admitted to probate. The will was admitted to probate, appellant was appointed and duly qualified as executor and thereafter entered upon the discharge of its duties. At the hearing to admit the will to probate Mrs. Douglas filed notice that she reserved the right to object and contest any provisions of the will.

On June 20, 1914, Mrs. Pettit filed with the probate court a rescission and withdrawal of her consent to the provisions of the will and gave notice of her intention to take, in lieu of the provisions of the will, the share of her husband's estate to which she would have been entitled had there been no will. Appellant opposed this action on the part of Mrs. Pettit. A hearing was had thereon, which resulted in a decree of the probate court in favor of the widow, which was affirmed by this court upon certiorari. 129 Minn. 442, 152 N. W. 845, L.R.A. 1915E, 815.

The executor then proceeded to administer the estate in the usual manner, and on August 6, 1915, filed its final account and asked that the estate be distributed. From such account it appeared that all of the debts, the legacy of \$1,000 and the expenses of administration, including \$5,993.72 for attorneys' and executor's fees had been paid in full, and that there remained in the hands of the executor for distribution, personal property of the value of \$148,038.68, and the real estate, including the mineral holdings.

On January 28, 1916, the probate court made a decree of distribution, adjudging and decreeing that the provisions of the will, except as to the legacy of \$1,000, were invalid, inoperative and void as a disposition of real and personal property under the laws of this state; that Deborah M. Pettit, widow of deceased, was entitled to an undivided one-third of the real and personal property then in the hands of the executor, and that Bessie P. Douglas, daughter of deceased, was entitled to two-thirds thereof. The widow and heirs were satisfied with the decree of distribution. The debts and expenses of administration had all been paid. The estate had been fully administered and the property was intact with the executor. The executor then appealed from that part of the decree of distribution which gave the daughter two-thirds of the estate, to the district

court, where an affirmance was had. Thereafter it appealed from the judgment of the district court to this court and the judgment was affirmed. 135 Minn. 413, 161 N. W. 158.

In February, 1917, the executor filed a supplement to its final account, setting forth the receipts and disbursements subsequent to the rendering of the final account, in which it asked credit for \$5,000 as executor's fees, \$4,900 for legal services and \$47.84 for transcripts and printing, all in connection with the two appeals following the decree of distribution.

The widow and daughter objected to the allowance of these items, upon the ground that they were charges for disbursements made by the executor and trustee under an invalid trust, in connection with unsuccessful appeals by it from the decrees of the probate and district courts. The probate court disallowed all of such claims, except that it allowed the executor \$1,800 for services in caring for the estate subsequent to the filing of the final decree. Thereupon the executor appealed to the district court from that part of the decree of the probate court disallowing such items, and the widow and daughter appealed from the allowance of the item of \$1,800.

In January, 1919, the district court filed its findings of fact and conclusions of law, holding that all the items for which credit was asked were for disbursements in unsuccessful appeals by the executor from the decree of distribution, and affirmed the action of the probate court in disallowing the same and reversed the order allowing the item of \$1,800. Judgment was entered accordingly and the executor appealed. No question was raised as to the competency of the testator to make his will nor as to the good faith of the executor throughout.

The question is presented: Is an executor, nominated in a will, entitled to reimbursement from the funds of the estate for services, expenses and counsel fees, in an unsuccessful appeal to sustain the will, the heirs contesting upon the ground that the will is void under the statute of trusts? The identical question, in principle, was passed upon by this court in the case of *Kelly v. Kennedy*, 133 Minn. 278, 158 N. W. 395, L.R.A. 1917A, 448, Ann. Cas. 1918D, 164. There the executor was nominated in the will, he presented the same for probate, the sole heir contested upon the ground of want of testamentary capacity in the testatrix. The will was allowed in the probate court and the allowance was affirmed

in the district court. On appeal there was a reversal. Upon the second trial in district court the will was disallowed, and upon appeal there was an affirmance. The probate court allowed the executor for his services and disbursements for expenses and counsel fees in connection with the contest of the will. Upon appeal the district court reversed the probate court and disallowed the claims. Throughout, the executor acted in good faith. In that case it was held that no legal duty rested upon the executor to procure probate of the will, and that he was not entitled to payment out of the funds of the estate for such disbursements. No different rule applies in this case, because the contest is upon the ground that the will is void under the statute, and we see no distinction such as would tend to change the rule adopted in the case cited.

Affirmed.

DIBELL, J. (dissenting).

I am unable quite to agree with the result reached. The trust created by the will provided for an accumulation of rents and profits of land. At the expiration of 20 years after the death of the testator's wife and his daughter and her husband and their three children, there was to be a distribution of the proceeds among the testator's three grandchildren and the children of any deceased grandchild by right of representation, and if it so happened that there was no living descendant of the testator's daughter at the expiration of the trust period, the proceeds were to be distributed among the collateral blood relatives of the testator and his wife. This was the clearly stated purpose of the testator. Its consummation was happily prevented by G. S. 1913, §§ 6687, 6688. The will was probated without opposition, the trust company was nominated executor by the will and was appointed by the court and discharged its duties as such. It was also the trustee in the trust created by the devise. In its effort to uphold the trust it sought to bring about the result which the testator wished. The trust provision could not be disregarded. The daughter could not safely take her portion as heir, even if she were allowed to have it, without an adjudication of a competent court that the trust was invalid. The ultimate and uncertain beneficiaries, contemplated by the trust, not born at the time of the death of the testator, could not participate or be represented in the determination of its validity. Still

the testator wished, if there should be beneficiaries within the class defined by him, that they take. His purpose could not be given effect, nor the interests of the possible beneficiaries guarded, unless the executor undertook to maintain the will, for the others were opposed. Its undertaking was in good faith. Under the circumstances it seems to me that it was authorized to take, at the expense of the estate, the opinion of the highest court of the state upon the validity of the trust. The rule stated in *Kelly v. Kennedy*, 133 Minn. 278, 158 N. W. 395, L.R.A. 1917A, 448, Ann. Cas. 1918D, 164, was advisedly adopted as one likely to work well and it is to be followed. It does not seem to me that allowing the executor fees under the circumstances of this case is opposed to it.

The trust company, in its capacity as executor or trustee, cannot disassociate itself from itself as a private corporation. Whether the fact that the upholding of the trust would result in profit to itself through the long years of administration should affect the amount of the allowance, is not for discussion in this dissent.

HALLAM, J. (dissenting).

I think the better rule is that when a will makes provision for beneficiaries not yet in being, the court may, in its discretion, make allowance out of the estate for the fees of an attorney who in good faith conducts litigation to sustain the will for their benefit. As a practical proposition this seems to be necessary. Otherwise the interests of such beneficiaries could not be protected at all.

BRUCE N. TAYLOR v. MCGREGOR STATE BANK.¹

December 5, 1919.

No. 21,483.

Soldiers' and Sailors' Civil Relief Act — construction — statutory foreclosure of mortgage.

The act of Congress known as the Soldiers' and Sailors' Civil Relief Act, approved March 8, 1918, was designed and intended to authorize

¹Reported in 174 N. W. 893.

and require in particular instances the restraint and stay of judicial proceedings commenced in any state or Federal court for the enforcement of pecuniary obligations against those in the military service of the United States, but it has no application to the nonjudicial proceeding for the foreclosure of a real estate mortgage by advertisement, as authorized by our statutes, which was fully completed by a sale of the mortgaged property prior to the commencement of the military service of soldier affected, though the period of redemption had not then expired.

Action in the district court for Aitkin county for an order extending the time within which plaintiff might redeem from foreclosure of mortgage pursuant to the Soldiers' and Sailors' Civil Relief Act of 1918. From an order, McClenahan, J., sustaining defendant's demurrer to the complaint, plaintiff appealed. Affirmed.

Louis Hallum, for appellant.

L. T. Mahany, for respondent.

BROWN, C. J.

Appeal from an order sustaining a general demurrer to plaintiff's complaint.

The facts as disclosed by the complaint, supplemented by certain verbal concessions made by counsel on the argument of the demurrer in the court below, and thus made part of the record, are as follows: Plaintiff and another person were the joint owners of the land and premises described in the complaint, and on December 4, 1915, they mortgaged the same to the Pioneer Life Insurance Company, a North Dakota corporation, to secure the payment of a debt due and owing by them to that company in the sum of \$1,617.83. Default was made in the payment thereof and the mortgage was duly foreclosed by advertisement, as authorized and provided for by our statutes on the subject, the sale thereunder being had on the fourteenth day of May, 1918; the right of redemption continuing for the period of one year thereafter, but none was made.

Plaintiff is a citizen of the United States of military age, and on June 14, 1918, 30 days after the date of the foreclosure sale, was duly called and inducted into the military service of the United States under the Selective Service Act of Congress,¹ in which service he thereafter and up

¹[40 St. 76, c. 15 (U. S. Comp. St. 1919 Supp. 2019a, 2019b, 2044a-2044b.)]

to the commencement of this action remained in the active discharge of his military duties in this country and in France. By reason of his call to that service and his retention therein, he has been unable to provide funds with which to make redemption from the foreclosure, and on May 12, 1919, some ten days before the expiration thereof, brought this action under the act of Congress known as the Soldiers' and Sailors' Civil Relief Act, approved March 8, 1918, and prayed as relief that the time of redemption be extended by the judgment of the court for such reasonable time as might be sufficient to enable plaintiff to protect his rights in and to the mortgaged property by a redemption from the foreclosure.

The trial court held that the act of Congress relied upon, properly construed, had no application to the facts presented. In that conclusion we concur.

The general purpose of the act of Congress upon which the action is founded (sections 30781 $\frac{1}{4}$ a, et seq. U. S. Comp. St. 1919 Supplement),¹ was the protection of those in the military service, and to prevent injury to their civil rights during their term of service naturally to arise from judicial proceedings conducted against them in their absence. It was made to apply to those in the service on the date of its enactment, from and after that date, and to those subsequently entering the service from the date of such entry. It provides generally for restraining judicial proceedings against those in the service, to the prejudice of their rights, and is expressly made applicable to all Federal and state courts and to actions and proceedings commenced therein; that actions and proceedings so commenced during the period of military service may and in particular instances shall be stayed by order of the court to the extent necessary to protect the rights of the parties, including the stay of executions, attachments and garnishments issued during the military service. It protects rights in executory land contracts, and provides for restraining the foreclosure of mortgages, trust deeds and all sales of property under powers granted by contract, or under warrant of attorney, in the enforcement of any of which judicial proceedings are necessary. But we find no provision of the act from which it may be said that Congress intended it to apply to other than judicial proceedings instituted to enforce pecuniary and kindred obligations. The proceeding involved in this action, the statutory foreclosure by advertisement is in no sense judicial,

¹ [40 St. 440, c. 420.]

for the power of authority of the court is in no way invoked or involved therein. It is wholly extra-judicial, and it is doubtful whether the act of Congress can be held to apply.

We do not however decide the point, for it seems beyond question that the act can have no application to proceedings of that character which were fully completed prior to the entry of the person affected thereby into the military service. Such is this case. The foreclosure proceeding was completed by the sale on the fourteenth day of May, 1918, and plaintiff did not enter the military service until June 14 following. Properly construed the act can have a prospective operation only, which of course would include proceedings coming within its terms which were pending at the time of the entry of the soldier into the military service. But it cannot well be construed to relate back so as to affect a fully completed proceeding of the character of that here involved and authorize the court either to annul or undo the same, or suspend the operation and effect thereof, though the period of redemption had not expired on the date the soldier entered the service. It is clear that the act does not cover such a case, and the order appealed from must be and is affirmed, without a consideration of other questions going to the validity or scope of the statute.

Order affirmed.

MALVIE DENSON v. DAN McDONALD AND OTHERS.¹

December 5, 1919.

No. 21,505.

Negligence — finding sustained by evidence.

1. The evidence sustains the finding of the court that the defendant negligently ran its auto truck into the auto of the plaintiff which was parked along the side of a village street.

Same — violation of village ordinance immaterial.

2. An ordinance of the village prohibited the parking of an auto within 20 feet of a hydrant. That the plaintiff's auto was so parked did not prevent a recovery.

¹Reported in 175 N. W. 108.

Action in the municipal court of Minneapolis to recover \$350 for injuries to plaintiff's automobile caused by the negligence of defendants' servant. The case was tried before C. L. Smith, J., who made findings and ordered judgment in favor of plaintiff for \$300. From an order denying their motion to amend the findings or for a new trial, defendants appealed. Affirmed.

Archie Miller and *C. E. Warner*, for appellants.

C. H. Slack, for respondent.

DIBELI, J.

Action to recover damages to the plaintiff's auto which was run into by an auto truck of the defendant. The case was tried to the court which found for the plaintiff. The defendant appeals from the order denying its motion for a new trial.

1. The plaintiff's auto was parked along the curb of a street in the village of Hopkins. The defendant's auto truck, loaded with four or five tons of merchandise, was being driven along the street. There was an excavation or ditch which had been constructed by the village part way across the street. The driver allowed one wheel to go into the ditch, the steering wheel was wrenched from his hands, he lost control of the truck, and it struck the plaintiff's auto and pushed it into a hydrant. The evidence justifies the court's finding that the defendant was negligent in driving his auto and that by his negligence the injury was caused.

2. An ordinance of the village prohibited the parking of an auto within 20 feet of a hydrant. There is evidence that the plaintiff's auto was within 20 feet of the hydrant against which it was crushed. It may be assumed that it was. This does not prevent a recovery. The ordinance was not for the protection of the traveling public. Its purpose was to keep the hydrant accessible for quick use in case of need. The presence of the auto within the forbidden limits had, in a legal sense, no causal connection with the accident. Without such causal connection the plaintiff's violation of the ordinance would not prevent a recovery. *Armstead v. Lounsberry*, 129 Minn. 34, 151 N. W. 542, L.R.A. 1915D, 628, and cases cited; *Derr v. Chicago, M. & St. P. Ry. Co.* 163 Wis. 234, 157 N. W. 753; 1 *Shearman & Redfield*, Neg. § 94. In the two cases cited the injured plaintiff was using an unregistered auto contrary to statute. If

he had been observant of the statute he would not have been on the road at all so no injury from the negligence of the defendant, if such negligence happened to occur, would have come to him. But in neither was the violation the proximate cause of the accident. In this case the auto of the plaintiff, if he had been strictly observant of the ordinance, would not have been at the place of the injury, and it would not have been harmed. Its presence there was the occasion but not in a legal sense a contributory cause of the injury. See 2 Dunnell, Minn. Dig. § 7004. If the plaintiff's auto had been injured by a fire truck coming to the hydrant for water service, the result might have been different, and in such case the conduct of the plaintiff might have been important upon the question of the negligence of the driver of the fire truck. And, in the case which we have, the court found that plaintiff's failure to observe the ordinance was not a contributing cause of the accident.

Order affirmed.

ANNA MARIA BOYEA v. FRANK J. BESCH.¹

December 5, 1919.

No. 21,508.

Findings of fact.

1. The findings of fact are sustained by the evidence.

Jury trial.

2. The record does not present the question for review here whether defendant was erroneously deprived of a jury trial.

Cross-examination of witness without tender of fee.

3. No reversible error may be predicated on the fact that defendant was called for cross-examination without being tendered witness fees, or that plaintiff's whole case rested on the testimony so obtained.

Action in the district court for Washington county for an accounting for crops harvested upon certain land during 1917 and for the expense incurred in raising the crops; that the crops be sold and the expense of raising them paid, and that the surplus be divided between the parties

¹Reported in 174 N. W. 894.

in equal shares according to their respective interests. The case was tried before Searles, J., who made findings and ordered judgment in favor of plaintiff for \$183.15 and interest. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Ch. Jaudon Berryhill, for appellant.

O. E. Holman, for respondent.

HOLT, J.

Plaintiff sued, alleging that she and defendant, her brother, owned a farm in Washington county as tenants in common; that defendant was in possession; that in the spring of 1917 it was agreed that defendant should sow and cultivate the farm during that year, plaintiff to receive one-half of the crop and pay one-half of the expense of raising it; that defendant farmed under that agreement, but refused to deliver to her any part of the crop, and had sold or appropriated the whole thereof, and that the value of her share, after deducting her part of the expenses, was \$250. Her prayer was that defendant be required to account for the crop harvested and for the expenses incurred in raising the same, and that she receive her share of the proceeds or of what remained of the crop. The court made findings in accord with plaintiff's allegations and awarded her \$185.15. Judgment was entered pursuant to the findings. Defendant appeals.

The assignments of error assail the findings of fact as to the agreement, the reasonable value of the crop raised, and the expenses of raising the same. The agreement is found in a letter, Exhibit A, written by defendant to plaintiff on April 24, 1917, wherein, after making an offer for her interest in the land, he says: "Now about the this year crop the way it is now you will get half share in the this year's crop and then you got to pay half of the expenses also." Then he goes on to renew the offer to purchase the land for \$3,000, but, in such event, he wants the whole crop and all the personal property of hers on the farm. The letter clearly indicates an agreement in respect to the crops for 1917, unless a sale was effected. There was no sale. The letter was so worded that mere silence of plaintiff was an assent to the cropping arrangement which defendant stated as an existing fact. Under the agreement it undoubtedly was defendant's duty to keep an accurate account both of the crop har-

vested and the expenses connected therewith. This he did not do. When called as a witness to account, his answers were evasive and his memory incredibly at fault. He attempts to excuse his lack of knowledge by saying some memorandum book had been burned, but does not say whether it was destroyed by accident or design. He does not give any reason why he could not have obtained accurate information from the one who threshed as to the number of bushels of grain raised. We are not convinced from defendant's testimony, and he is the only witness plaintiff had, that the court did him any injustice in the findings mentioned. If there possibly should be, it must be laid to his own fault or neglect.

The chief error of which defendant complains is that he was deprived of a jury trial. At the call of the term calendar the attorney who represented defendant stated the case was for the jury; plaintiff's attorney insisted that it was an equity action triable to the court. The clerk's entry is: "For trial. Court determines that above case was a court case." The record does not contain any further request, either for a jury trial when it was reached for trial, or for submission of issues to the jury, or any objection to the court proceeding without a jury, and no exception to the ruling of the court made on the call of the calendar or brought to its attention by a motion for a new trial. The point that defendant was erroneously deprived of a jury is not available upon the record before us. *Banning v. Hall*, 70 Minn. 89, 72 N. W. 817.

The propositions that the court erred in permitting defendant to be called for cross-examination without being tendered his witness fees, and that plaintiff could not make her whole case from his testimony when so called, are so palpably without merit that no discussion thereof is necessary. The same holds true as to the error assigned on the reception of the letter, *Exhibit A*.

The judgment is affirmed.

IN THE MATTER OF JUDICIAL DITCH NO. 2.
PAUL J. FALKENHAGEN v. COUNTIES OF YELLOW MEDICINE AND LAC QUI PARLE.¹

December 5, 1919.

No. 21,536.

Judicial ditch — order not appealable.

1. An order establishing a judicial ditch is not appealable and cannot be attacked on an appeal taken to review a reassessment of benefits and damages.

Same — testimony of viewers admissible, when.

2. Where a jury trial is had to determine the benefits and damages which a farm will receive from the ditch, the viewers may testify as to the quantity of wet land on the farm and as to its value with and without the ditch, and such testimony does not infringe the rule that their assessment is not to be used as evidence at such trials.

Same — competency of witnesses.

3. The court did not exceed its discretion in ruling that the witnesses who testified as to value were competent to do so.

Same — farm crossing and fence — charge to jury.

4. The court properly directed the jury to determine what sort of a farm crossing the average farmer would construct over the ditch, and what sort of fence would be suitable along it, and to allow for such a crossing and for the amount of such a fence made necessary by the ditch, in fixing appellant's damages.

Paul J. Falkenhagen, deeming himself aggrieved by the order of the court determining that his lands in Lac qui Parle would be benefited by the construction of Judicial Ditch No. 2 in Yellow Medicine and Lac qui Parle counties, demanded a jury trial. The matter was heard by Daly, J., and a jury which returned a verdict that the land was benefited \$6,100 and damaged \$1,600. From an order denying his motion for a new trial, demandant appealed. Affirmed.

Oluf Gjerset, for appellant.

O. A. Londe, for respondents.

¹Reported in 175 N. W. 102.

144 M.—17.

TAYLOR, C.

The appellant is the owner of a half section of land which is crossed by Judicial Ditch No. 2 of Yellow Medicine and Lac qui Parle counties. Being dissatisfied with the amount of benefits and damages assessed to this land in the order establishing the ditch, he demanded a jury trial and had the benefits and damages reassessed by a jury. Thereafter he made a motion for a new trial and this appeal is from the order denying his motion.

1. It appears that when the original report of the viewers came before the court for consideration, the court resubmitted the entire matter of assessments to the viewers for further examination and further report, and that the order establishing the ditch was based on the second report of the viewers made pursuant to such resubmission. Appellant seeks to attack the order establishing the ditch, on the ground that the resubmission to the viewers of the matter of the assessments was not warranted by the facts then before the court. It is sufficient to say that no appeal lies from the order establishing the ditch, and that the ruling in question is not reviewable on this appeal.

2. At the trial the viewers were called as witnesses and testified as to the number of acres of wet land on the different subdivisions of appellant's farm, and while doing so were permitted to refer to memoranda made by themselves while examining the land as viewers. They also testified as to the value of the farm with and without the ditch. We find nothing improper or objectionable in this testimony, and are unable to sustain appellant's contention that its reception infringed the rule recognized in *Dodge v. County of Martin*, 119 Minn. 392, 138 N. W. 675; *Cunningham v. County of Big Stone*, 122 Minn. 392, 142 N. W. 802; and *Rooney v. County of Stearns*, 130 Minn. 176, 153 N. W. 858, that the assessments made by the viewers should not be used as evidence before the jury. The viewers were competent witnesses, and no attempt was made to show the amount of their assessments either by offering their report in evidence or otherwise.

3. Appellant also complains that some of the witnesses "were permitted to give their opinions as to the value of the land involved in the suit without showing that they were qualified to give such opinion." They had been farmers in that part of the state for many years and had

a general knowledge of the value of such lands derived from common report or other information. We think it was within the discretion of the trial court to receive their testimony.

4. Appellant complains of four paragraphs of the court's charge, but we find nothing improper or prejudicial in them. The two most important related to a farm crossing over the ditch and fences along it. The court in effect directed the jury to allow appellant the expense of constructing and maintaining such a crossing as in their judgment "the average man (would) use for a crossing there;" and further directed them to determine what kind of a fence would be suitable along the ditch, and whether a fence was needed on both sides of it, and allow him the cost of constructing and maintaining such fencing as they found that he would need. We think that these questions were for the jury to determine and that appellant has no substantial ground for complaining of the manner in which they were submitted. We are also unable to sustain the contention that the matter of these damages was submitted in such a manner as to exclude damages for the inconvenience in operating the farm caused by its being divided into two parts by the ditch.

Order affirmed.

STATE EX REL. ANNA JACOBSON v. DISTRICT COURT OF
HENNEPIN COUNTY.¹

December 5, 1919.

No. 21,608.

Workmen's Compensation Act — accident not caused by employment.

The relator's husband worked for Minneapolis driving a sprinkler. He furnished his services and the use of his team and the running-gears of his wagon for a stated daily compensation. He worked eight hours a day, from 8 in the morning until 5 in the evening, with an hour off at noon. He fed and stabled his team at his own expense. One evening, after his day's work was done, he was killed by one of his horses while he was caring for it in his stable. It is *held* that the accident did not arise out of his employment and that he was not entitled to compensation under the Workmen's Compensation Act.

¹Reported in 175 N. W. 110.

Upon the relation of Anna Jacobson the supreme court granted its writ of certiorari directed to the district court for Hennepin county and the Honorable William C. Leary, judge thereof, to review proceedings in that court brought under the Workmen's Compensation Act by relator, as employee's widow, against the city of Minneapolis, employer. Affirmed.

John R. Coan, for relator.

C. D. Gould and *W. G. Compton*, for respondents.

DIBELL, J.

Certiorari to the Hennepin district court to review its judgment denying compensation to the relator under the Workmen's Compensation Act for the death of her husband.

The relator's husband, Charles Jacobson, was employed by Minneapolis. He was driving a sprinkling wagon. He furnished his team and the running-gears of the wagon. The city furnished the tank. He kept the sprinkler in the rear of his house and stabled his horses in his barn on his premises and fed and cared for them at his own expense. He worked eight hours a day commencing at 8 and quitting at 5, with an hour off at noon, and received for his services and the use of his team and wagon six dollars per day.

On the day of his injury he had finished his day's work, had gone home and stabled and fed his horses, and had eaten his supper. After supper he went to the stable to doctor one of his horses which had a sore neck. While he was so engaged the horse killed him.

The Workmen's Compensation Act gives compensation to an employee for a personal injury caused by an "accident arising out of and in the course of his employment." G. S. 1913, § 8195. It does not give compensation to employees "except while engaged in, on or about the premises where their services are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of such service as such workmen." G. S. 1913, § 8230 (i).

The facts stated give no right to compensation. The plaintiff's work for the day was done. He was not to do service for the city until the next morning. The horses were his and he fed and cared for them and furnished them and his wagon ready for work at a definite time. The

accident did not arise out of his employment any more than would an accident which came while he was repairing his wagon or while doing other work in preparation for his next day's work for the city. The relator cites cases where a teamster, injured while caring for his horses after their work for the day was done, was allowed compensation. *Smith v. Price*, 168 App. Div. 421, 153 N. Y. Supp. 221; *Costello v. Taylor*, 217 N. Y. 179, 111 N. E. 755; *Suburban Ice Co. v. Industrial Board*, 274 Ill. 630, 113 N. E. 979. They involve situations where a teamster was doing work for his employer in the care of his employer's team and as a part of the work for his employer. In none of them did the employee furnish his team ready for work, and receive an injury while caring for it out of the work hours for his employer. The distinction is obvious and basic. Nothing said should be understood as an intimation that one employed, as was relator's husband, would not have compensation if injured by horses which he was using at the time in his work for his employer, though it chanced that he owned them.

Judgment affirmed.

JOHN P. O'REILLY v. POWERS MERCANTILE COMPANY AND
OTHERS.¹

December 12, 1919.

No. 21,374.

Master and servant — unsafe place of work — insufficient evidence.

In an action against an employer to recover damages for illness claimed to have been caused by inhaling disease germs, while at work in a room where fur garments were stored, as a result of the alleged negligence of the master in failing to notify the plaintiff of the dangerous condition of such room, *held* that the court was justified, under the evidence, in directing a verdict for the defendant.

Action in the district court for Hennepin county to recover \$5,000. The facts are stated in the opinion. The separate answers alleged plaintiff assumed the risks of his employment and that the hazards incident thereto were obvious. The case was tried before Fish, J., who at the close

¹Reported in 175 N. W. 116.

of plaintiff's case granted defendants' motion for a directed verdict. From an order denying his motion for a new trial as to Ernest M. Ganley Construction Company, plaintiff appealed. Affirmed.

George R. Smith, H. Stanley Hanson and Leo J. Gleason, for appellant.

K. A. Campbell and B. Burness, for respondents.

QUINN, J.

Action to recover damages for illness contracted through the alleged negligence of defendants. The trial court directed a verdict in favor of the defendants at the close of plaintiff's testimony. From an order denying his motion for a new trial as to defendant Ganley Company, plaintiff appealed.

The defendant Powers Mercantile Company owned a four-story building fronting on Fifth street in the city of Minneapolis, in which it conducted a department store. The Ganley Company is a corporation engaged in the repair of buildings in and about that city.

The Powers Company employed the respondent to make certain changes and repairs in its store, and on April 22, 1918, respondent undertook the relining of a room, located in the center of the fourth floor of the store, with ordinary tar paper. This room was approximately 14 by 16 feet with a seven foot nine inch ceiling, and had existed and been used since 1916 as a place to store furs and fur garments received for that purpose from customers. It was sealed up tight and lined with two thicknesses of paper nailed onto the wall. The only openings into the room were two doors, one of which was kept closed.

The respondent directed the plaintiff and one Davies, carpenters in its employ, to reline this room with paper furnished them. The work consisted in removing certain hangers which were in the way, and the loose fragments of the old paper, and putting on the new. The rolls of new paper were left outside the room near the entrance and cut into strips as needed. Plaintiff worked six hours on April 22, and five hours on the following day, when he was taken sick as hereinafter outlined.

Plaintiff was a man in good health, 58 years of age, and had for nearly 40 years been engaged at carpenter, cabinet and mill work in that vicinity. He testified that, while at work in this room on the afternoon of the

second day, he was taken suddenly ill; that his limbs became weak, perspiration came out all over his body; that he became dizzy and his eyesight became dim; that he left the room and went to the carpenter shop where he remained until quitting time, when he went home; that he took a little supper and went to bed at about nine o'clock, and awoke the next morning with a choking, strangling sensation; that he tried to drink, but could not swallow, and then sent for Dr. O'Brien.

Appellant contends that the walls and air of this room were impregnated with infection and disease germs emanating from the putrefaction of the furs and skins kept therein and from the chemicals with which such furs were treated; that the plaintiff's illness was brought about by inhaling the same while so at work; that the respondent knew, or ought to have known, the condition of such room, and that it was its duty to have informed the appellant thereof and cautioned him as to the danger which might result therefrom, and because of a failure so to do it was guilty of negligence.

The trial court assigned two reasons for granting the motion for a directed verdict: (1) That the evidence failed to show the real cause of plaintiff's illness; (2) that there was no evidence of neglect of either of the defendants.

It appears from the testimony that Davies continued to work in and about the room for about a week when he was taken ill with symptoms similar to those of the plaintiff. Dr. O'Brien was the only physician who gave testimony upon the trial. He testified that he was called to see O'Reilly on April 25; that he found him in a highly nervous condition, his voice was muffled and he had difficulty in breathing; that his trouble developed into facial paralysis; that the patient was under his care for seven weeks, during which time he visited him at his home 10 or 12 times; that thereafter the patient came to his office and was under his observation. The doctor further testified that in his opinion there was a possibility, if any of the hides were not thoroughly cured, that there might be a chance for septic poison, or from the chemicals used in the tanning of the hides or for killing the germs that might destroy the furs, a toxic condition might exist; that in his opinion the patient's condition might have been brought about either from a toxic or septic condition or from other causes.

The witness Flynn testified that he had been in the fur business for about 30 years, three years with the Powers Company; that the room in question was built at his suggestion for the purpose of storing customers' furs; that he personally handled all the furs that went into that room; that they were thoroughly cleaned before being put there, and that nothing other than the paper was used to keep out moths and vermin; that during the busy season he was in and out of the room on an average of five or six times per day, remaining from a half to three-quarters of an hour, and that he had never contracted any illness therefrom, nor had they ever had any complaint from any of their employees working about this room on account of any ill effect therefrom.

The record is barren as to proof that respondent knew or had reason to believe that either the air or the walls of the room contained any disease germs or other dangerous infection. There was no proof that any hides not thoroughly cured were ever put into the room. Nor were chemicals of any kind ever used to protect the furs from moths or other vermin. We think the evidence justified the trial court in directing a verdict.

Affirmed.

H. STANLEY HANSON v. FLORENCE H. VOSE AND
ANOTHER.¹

December 12, 1919.

No. 21,450.

Fixture.

1. A chattel does not become a fixture, unless physically or constructively annexed to the freehold.

Chattel.

2. An article annexed to the freehold, but which can be removed without substantial injury to the realty, may remain a chattel, if the circumstances show that such was the intention.

Landlord and tenant — fixture.

3. Where the holder of a ground lease erects an apartment building

¹Reported in 175 N. W. 113.

and installs a gas range and a door bed in each flat, and thereafter forfeits his lease, these articles will pass as fixtures to the owner of the realty, if no rights of third parties are infringed and there be no agreement to the contrary.

Same — rights of third parties.

4. As against third parties having rights in these ranges and beds, the landowner is in substantially the same position as a prior mortgagee of the land.

Conditional sale of gas ranges and door beds — rights of vendee's assignee.

5. Where the holder of the ground lease purchased these ranges and beds under a conditional contract of sale, by which title and right of removal remained in the vendors, and after defaulting in his payments transferred all his rights in them to a third party, not concerned in the real estate, whom the vendors accepted as the purchaser in his stead, he never had the right to make them a part of the realty, and such third party is entitled to them as against the landowner.

Rule inapplicable.

6. The rule requiring a tenant to remove his removable fixtures at or before the end of his term does not apply to a person in the position of such third party.

Action in replevin in the district court for Hennepin county to recover possession of the chattels enumerated in the first paragraph of the opinion, or for \$1,738.25, the value thereof in case delivery could not be had and \$500 for their detention. In their answer defendants alleged that demand was made for the property and refused by defendants; that the property had not been taken for a tax assessment or fine, nor sold under an execution or attachment and that defendants were still in possession of the property. The case was tried before Fish, J., who when plaintiff rested denied defendants' motion to dismiss the action and at the close of the testimony granted their motion for a directed verdict in favor of defendant Vose. From an order denying his motion for a new trial, plaintiff appealed. Reversed.

George S. Grimes, for appellant.

William B. McIntyre, for respondents.

TAYLOR, C.

Replevin to obtain possession of 19 Murphy door beds, 19 gas ranges

and two laundry stoves. The court directed a verdict for defendant, and plaintiff appealed from an order denying a new trial.

Defendant Vose, who will be designated as defendant hereafter, leased a parcel of land in the city of Minneapolis to Harold N. Falk for a term of one hundred years at a specified annual rental payable quarterly. The lease required Falk to erect a brick apartment building on the property "divided into flats and all complete and ready to live therein and to rent," and provided for the execution of a mortgage on the building and land for a part of the cost of the building. Falk erected a building divided into 19 flats and installed a Murphy door bed and a gas range in each flat and two gas laundry stoves in the basement. He purchased the ranges and stoves from the Minneapolis Gas Light Company under a contract which provided for payment of the purchase price in monthly instalments, and further provided that the company retained ownership of them, with the right to take possession of and remove them in case of default in such payments. He purchased the beds from the New England Furniture & Carpet Company under a similar contract. These contracts were duly filed in the office of the city clerk. After making the stipulated payments for a considerable time, Falk defaulted therein, and on account of such default the gas company was about to reclaim and remove the ranges and stoves, and the furniture company was about to remove the beds. Falk was also indebted to A. R. Chesnut in the sum of \$4,000. He and Chesnut made an arrangement with plaintiff, by which he conveyed to plaintiff by bill of sale all his interest in the ranges, stoves and beds, and plaintiff agreed to make the remaining payments to the companies as they accrued, and to sell the ranges, stoves and beds as soon as they were fully paid for, and, after deducting his advances with interest from the proceeds, to pay the balance thereof to Chesnut to be applied on Falk's indebtedness to Chesnut. Falk assigned to plaintiff his contract with the furniture company and that company assented thereto. Falk's contract with the gas company was surrendered and canceled, and in lieu thereof a new contract was executed by that company directly to plaintiff. Plaintiff made the payments to the companies as they accrued, until the amounts unpaid were reduced to the sums of \$35 and \$20, respectively.

In the meantime defendant had canceled Falk's ground lease of the

land for nonpayment of rent, and took possession of the building and the ranges, stoves and beds, claiming them as a part of the realty. About five weeks later, and after an unsuccessful attempt to adjust the matter, plaintiff brought this action.

The question presented is whether the court erred in ruling as a matter of law that the ranges, stoves and beds had become a part of the realty.

While there are well settled general rules for determining whether an article, originally personal property, has become a fixture, that is, a part of the realty, it is frequently difficult to determine whether, under the peculiar facts of a particular case, a particular article has become a part of the realty or still remains personal property.

To become a fixture the article must be physically or constructively attached to the freehold. If not attached to the freehold and not an essential or component part of some structure or appliance which is attached to it, the article remains a chattel, although intended for permanent use on the premises. If annexed to the freehold, the manner in which it is annexed may convert it into realty regardless of other considerations, as where brick or other material has been incorporated into a permanent building, or where an article, otherwise a severable chattel, cannot be removed without leaving the freehold in a substantially worse condition than before the annexation. Usually, however, the manner of annexation is not decisive, but only one of several facts to be taken into account in determining whether the article has become realty or remains personalty as between the parties concerned. *Northwestern Lumber & W Co. v. Parker*, 125 Minn. 107, 145 N. W. 964.

In the present case the ranges and stoves were annexed to the building only by the ordinary plumbing fixtures, and could be unscrewed from the gas pipes and removed without injury to the building itself. The door beds were arranged to swing back into closets when not in use. In order to receive them the closets were constructed of a greater size and with wider doors than ordinary closets. Each bed rested on a pedestal which was fastened to the floor by screws, and served as a pivot on which the bed was swung from the room into the closet or from the closet into the room. There was also an appliance for holding the bed in position which was fastened to the door casing by screws. These beds could be removed without material injury to the building. Both the ranges and

stoves and the beds were annexed to the building sufficiently to constitute them fixtures under some circumstances. So far as annexation is concerned they are in about the same situation as the radiators and office desk held to be fixtures as between mortgager and mortgagee in *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257, 52 Am. St. 582.

Falk took possession of the land as lessee for a term of 100 years under a lease which required him to erect an apartment building, divide it into flats and fit them ready to rent. In completing the building he placed a gas range and door bed in each flat for the use of those who should rent the flats. These articles were adapted to the purpose for which the building was constructed, and enhanced its rental value, and were intended to be rented with the flats as a part thereof. Under such circumstances Falk's position was different from that of an ordinary tenant who rents a building and installs conveniences therein for his own use, and these articles would clearly be fixtures as between him and defendant, if no rights of third parties were involved. But Falk purchased these articles under a conditional sale contract, by which they were to remain chattels with the title and right of removal in the vendors. They never became Falk's property and he never acquired the right to make them a part of the realty. He defaulted in the stipulated payments, and, when the vendors were about to retake their property, he made an agreement with the vendors and the plaintiff, by which the plaintiff was substituted in his stead as purchaser and was to become the owner of these articles on completing the payments as provided in the contracts. Plaintiff had no interest in the real estate, either as tenant or otherwise; neither had Chesnut, for whose benefit plaintiff seems to have taken over the contracts. Plaintiff dealt with these articles as chattels, and intended that they should remain chattels. This clearly appears from the fact that if they became a part of the realty in which he had no interest, he would acquire nothing by his payments, and would be unable to carry out his contract with Chesnut. He clearly had the right as against Falk to remove these articles from the building and the question here is whether he also had that right as against defendant.

The rule that articles so annexed to the freehold as to appear to be fixtures pass to a subsequent purchaser, who buys the land without notice of the rights of third parties in such articles, does not aid defendant, for

she is not a subsequent purchaser, but acquired all her rights in the land before the articles in controversy were annexed to it. As against plaintiff, she is in substantially the same position as a subsequent purchaser with notice of his rights, and has no better claim to these articles than a prior mortgagee of the realty would have. Such a mortgagee cannot hold as a part of the realty articles annexed to it by the mortgagor, but to which the mortgagor never acquired title. *Belvin v. Raleigh Paper Co.* 123 N. C. 138, 31 S. E. 655.

In *Medicke v. Sauer*, 61 Minn. 15, 63 N. W. 110, trade fixtures purchased under a conditional contract of sale were installed by the vendee in a leased building, and were subsequently surrendered with the building to the landlord, who thereafter claimed them as part of the realty and leased the building with the fixtures therein to other parties. It was held that the landlord had no better title to the fixtures than the vendee in the conditional contract of sale, and that the vendor was entitled to recover their value from him on his refusal to surrender them.

In *Northwestern Mut. Life Ins. Co. v. George*, 77 Minn. 319, 79 N. W. 1028, 1064, a refrigerating plant purchased under a conditional contract of sale was installed in a cold storage warehouse owned and operated by the vendee. The action was between an assignee of the vendor and the holder of a mortgage on the realty executed and recorded prior to the installation of the refrigerating plant. It was held that the vendee had no conveyable title in the refrigerating plant, which he could vest in another so as to defeat the rights of the vendor, and that the vendor was entitled to the property as against the mortgagee of the real estate.

In *Merchants Nat. Bank v. Stanton*, 55 Minn. 211, 56 N. W. 821, 43 Am. St. 491, an oatmeal mill was erected and equipped with appropriate machinery by one Dobson on land belonging to Stanton, and in which Dobson had no interest other than that of a mere licensee. The court said that, in the absence of an agreement to the contrary, the building and machinery would become a part of the realty; that having been placed on the land with Stanton's permission they were personal property as between him and Dobson, and that the plaintiff, claiming under a mortgage of the real estate executed by Stanton prior to the erection of the mill, had "no better or greater right to these annexations than Stanton would have."

In *Pioneer Savings & Loan Co. v. Fuller*, 57 Minn. 60, 58 N. W. 831, the owner of a lot, with an uncompleted dwelling house thereon, mortgaged it under a promise to complete the building, and, among other things, agreed to complete the fireplace by putting in a mantel, grate and tiling. Instead of doing so, he leased the building under an agreement, by which the tenant installed the mantel, grate and tiling, with the right to remove them. It was held, following *Merchants Nat. Bank v. Stanton*, *supra*, that, although the mortgagee was not a party to the agreement with the tenant and these articles would be a part of the realty except for that agreement, the tenant had the right to remove them.

In *Pabst v. Ferch*, 126 Minn. 58, 147 N. W. 714, L.R.A. 1915E, 822, it was held in effect that a purchaser of real estate, without notice of the rights of third parties in articles which appear to be fixtures, is entitled to such articles as a part of the realty, but that a purchaser, with notice of the rights of third parties, is not entitled to them as against such third party.

The question as to whether the holder of a chattel mortgage on an article annexed to the freehold, is entitled to such article as against the owner of the real estate or the holder of a mortgage or other lien thereon, has been answered in favor of the holder of the chattel mortgage by several courts. *Edwards & Bradford Lumber Co. v. Rank*, 57 Neb. 323, 77 N. W. 765, 73 Am. St. 514; *Ames v. Trenton Brewing Co.* 56 N. J. Eq. 309, 38 Atl. 858; *Sisson v. Hibbard*, 75 N. Y. 542; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *Sword v. Low*, 122 Ill. 487, 13 N. E. 826; *Hewitt v. General El. Co.* 164 Ill. 420, 45 N. E. 725; *Belvin v. Raleigh Paper Co.* 123 N. C. 138, 31 S. E. 655.

The case of *Best Mnfg. Co. v. Cohn*, 3 Cal. App. 657, 80 Pac. 829, is much like the present case in its facts. There the lessee under a lease which provided for the construction of a mining plant equipped with machinery, and that the land with all improvements thereon should revert to the lessor, if the lease should be forfeited for breach of its covenants, purchased the machinery under a conditional contract of sale and annexed it to the realty. He forfeited his lease and failed to pay for the machinery. The lessor took possession of the land and also of the machinery, claiming it as a part of the realty. It was held that the vendor of the machinery was entitled to it as against the lessor of the real estate.

See to the same effect *Wetherill v. Gallagher*, 217 Pa. St. 635, 66 Atl. 849.

As already stated defendant occupied no better position in respect to the articles in controversy than a subsequent purchaser of the real estate with notice, or the holder of a prior mortgage on it, and we have reached the conclusion that she was not entitled to them as against plaintiff and that plaintiff had the right to remove them.

The rule requiring a tenant to remove what are frequently termed removable fixtures at or before the end of his term does not apply where the duration of the term is uncertain, *Ray v. Young*, 160 Iowa, 613, 142 N. W. 393, 46 L.R.A.(N.S.) 947, Ann. Cas. 1915D, 258, and note attached to the L.R.A. report, nor to a person in the position of the plaintiff herein. *Medicke v. Sauer*, 61 Minn. 15, 63 N. W. 110.

The order appealed from is reversed.

CHARLES J. McDONALD v. THE CUYUNA RANGE POWER
COMPANY.¹

December 12, 1919.

No. 21,478.

Contributory negligence—question for jury.

Upon the evidence neither defendant's freedom from the negligence charged nor plaintiff's contributory negligence appeared as a matter of law, and it was error to direct a verdict in favor of defendant.

Action in the district court for Crow Wing county to recover \$10,000 for personal injuries. In its amended answer defendant alleged that it had been informed that about November 24, 1916, plaintiff, while in an intoxicated condition, went over and across certain premises in the possession of defendant, without its knowledge, permission or consent; that if plaintiff was injured, such injury was caused by the negligence, condition, careless and unauthorized acts of plaintiff. The case was tried before McClenahan, J., who at the close of the testimony granted defend-

¹Reported in 175 N. W. 109.

ant's motion for a directed verdict. From an order denying his motion for a new trial, plaintiff appealed. Reversed.

Charles W. Scrutchin, for appellant.

F. E. Ebner, for respondent.

HOLT, J.

Defendant is in possession of a tract of land a short distance northeast of Riverton, this state, upon which is located a plant for generating electric current which is distributed to surrounding towns and villages for light and power. There are buildings of various sorts. A public road runs north and south on the westerly side of the premises. From this public road a roadway or trail diverges to the northeast over the land occupied by defendant and passes between a water-tank and a dwelling house standing about 75 feet apart. It is not a public road. The evidence tends to show that it is considerably traveled by persons on foot and by teams. It is not only used by those who are connected with defendant's enterprise, but by others who have occasion to visit some camps to the north or northeast of defendant's plant. In the latter part of November, 1916, defendant undertook to install running water in the house, and for that purpose dug trenches some six feet in length, three in width, and six in depth, at intervals of some ten feet, between the tank and the house. On the evening of November 24, while these trenches were open, plaintiff fell into one of them and claims to have received injuries for which he sought damages by this action. At the conclusion of the trial the court instructed the jury to return a verdict for defendant. The appeal is from the order denying plaintiff's motion for a new trial.

The court appears to have granted the motion for a directed verdict solely on the ground that contributory negligence was conclusively shown. But, since it is contended that the evidence is insufficient to go to the jury on defendant's negligence, the record must be examined as to that proposition also, for a directed verdict was proper in any event if the proof failed to show defendant guilty of the negligence alleged. However, in view of the conclusion that a new trial should be had, it is deemed best not to discuss this phase of the case to any extent, except to say that the jury could find that plaintiff was not a trespasser in making use of the road, and they might find negligence, if they concluded that the

trench was left unguarded so near the traveled trail that a misstep in the dark might cause a traveler to fall in. The case most in point, cited by defendant, is *Fredenburg v. Baer*, 89 Minn. 241, 94 N. W. 683, but it is to be noted that the opinion therein stresses the absence of evidence that defendant knew of the practice of those who used the upper floor in his building to pass near the place where the pit which caused the injury was dug; while in the instant case the testimony is that those in charge of defendant's plant knew that the road in question was used by plaintiff and others, and that no objection was made to such use. The learned trial court was right in not basing a directed verdict upon the insufficiency of the evidence to carry the issue of defendant's negligence to the jury.

In considering the issue of contributory negligence, it is to be noted that this road was well defined, so that, to a person well acquainted therewith, it might be possible even in the dark to discover, by the touch of the feet, whether he was on or off the path or space trod by the teams and wheels of the vehicles; that plaintiff was entirely familiar with the road and its surroundings, passing over it frequently; that he did not know of any excavating or other work in progress on defendant's premises, and that the ground was already frozen, and hence one would scarcely expect any digging to be carried on. The evening in question was dark, and on cross-examination plaintiff answered in the affirmative, when asked whether the night was so dark that he couldn't see anything, that he couldn't see his hand before his face, and depended absolutely upon his knowledge of the way and the feeling of his feet as he walked along. Even so, it should not be held that one, who during such an evening attempts to pass along a well beaten road with which he is familiar and near which he has no reason to believe any pitfalls exist, is, as a matter of law, negligent, unless he is equipped with a lantern. Nearly every one who has reached mature age has had experience in groping along at night both inside buildings and in the open without the aid of artificial light. The conditions under which one undertakes to move about in the dark serve in a great measure to determine whether he should be charged with negligence in so doing. We are of opinion that the issue of contributory negligence was for the jury.

Order reversed.

KATIE WAMPA v. JOHN LYSHIK.¹

December 12, 1919.

No. 21,481.

Contract — granting judgment notwithstanding verdict error.

1. The complaint stated a cause of action for money had and received. The testimony admitted tended to prove a contract for the payment of money, and the court, after ordering the pleadings amended to conform to the proof, charged the jury that, if they found such contract to have been made, plaintiff should recover. There was a verdict for plaintiff. It is *held* that in granting defendant's motion for judgment notwithstanding the verdict the court erred insofar as the order was based upon the ground that no recovery on contract could be had under the complaint.

Same.

2. Nor can the order be justified on the ground that there was no evidence to sustain a recovery under the law as given in the charge.

Action in the district court for Morrison county to recover \$500 for money had and received. The facts are stated in the opinion. The case was tried before Parsons, J., who when plaintiff rested granted defendant's motion to amend the answer so as to conform to the proof, denied his motion for a directed verdict, and a jury which returned a verdict for \$689. Defendant's motion for judgment notwithstanding the verdict was granted, Roeser, J. From the judgment entered pursuant to the verdict, plaintiff appealed. Reversed.

D. M. Cameron, for appellant.

Paul Ahles and *E. F. Shaw*, for respondent.

HOLT, J.

Plaintiff's husband died seized in fee of 80 acres of land in Morrison county, which was his homestead. Thirteen children survived, three by plaintiff and ten by a former wife. Plaintiff continued in possession of the homestead after her husband's death. There was a first mortgage on the land for \$600; also a second mortgage for \$220 held by Mr. Martin, a banker of Little Falls. There seem to have been some negotiations

¹Reported in 175 N. W. 301.

with him looking to the foreclosing of the mortgage, so that plaintiff might thereby acquire title, but the court did not permit the arrangement to be shown. However, plaintiff claims that some time after Martin had begun the foreclosure, but before the sale, defendant, a neighbor and friend, went with her to the bank, and there, in the presence of Martin and others, it was agreed that defendant should bid in the land and pay plaintiff \$500, if he obtained title by the foreclosure. The complaint was for money had and received. The answer a general denial. At the close of the trial defendant asked leave to amend the answer. Plaintiff objected, but the court said: "The motion of the defendant is granted, and the pleadings are ordered amended to conform to the proof offered and received." The court charged the jury: "The question at issue is, did Lyshik agree either before the sale or before the expiration of the year of redemption, to pay this woman five hundred dollars? If he did, why then he should be held to his promises." The verdict was for plaintiff. Defendant made a motion in the alternative for judgment notwithstanding the verdict or a new trial. The court granted judgment. From the judgment thus entered plaintiff appeals.

The court gave two grounds for granting the motion: (1) The liability being upon an express contract cannot be enforced in an action for money had and received; and (2) the evidence is insufficient to make out a contract.

Conceding that the complaint for money had and received did not authorize a recovery based on a contract, the motion for judgment should, nevertheless, have been denied upon this record. Evidence tending to show a contract was received, and the jury were instructed to find for plaintiff if the contract was proved. Clearly a judgment upon the verdict so rendered would be a bar to any other action upon the contract. Furthermore, the record discloses that the court ordered the pleadings to be amended to conform to the proof. In that situation, it is quite impossible to show that the issue of a contract and defendant's obligation thereunder did not constitute the cause of action which was disposed of by the verdict. If the court erred in receiving the evidence under the pleading, or in submitting the issue that was submitted thereunder, the error ought to have been rectified by a new trial, and not by judgment non obstante.

Of course, if the evidence is insufficient to establish a valid contract for the payment of the money awarded, the judgment was properly entered for defendant. The contract was made several years before the trial, and was not in writing. The parties thereto were illiterate, understood very little of the English language, and made use of an interpreter when communicating with Mr. Martin in regard to the terms of the agreement. Mr. Martin was present at their several interviews. He did not understand Polish, the language the parties hereto used. He was the chief witness for plaintiff, and the only one who could intelligently relate the substance of the interviews as he was able to gather the same partly through interpreters and partly through such understanding as the parties could convey by what little knowledge they had of the English language. He was somewhat handicapped by the lapse of time and the fact that he was held rather strictly to the rule that he could not give the substance of the talk, but must state what each person said and to whom it was said. But this notwithstanding, we think the situation of the parties, as disclosed by the record and elucidated by the testimony of what was said and done at these several interviews between the parties, justified the jury in finding that defendant agreed to pay plaintiff the sum stated, if he acquired title to the land under the foreclosure. Plaintiff had the right of redemption, and her relinquishment of that right, or abstention from exercising it in reliance on defendant's promise, furnished a legal consideration for the agreement. The jury could find that she agreed to so relinquish or abstain, even though express words to that effect were not used. The entire situation and unmistakable intention of the parties, if the jury accepted the version of plaintiff and her witnesses as true, gave rise to an inference that she so agreed. Under the law of the case, as given in the charge, it cannot be said that the evidence does not justify a recovery by plaintiff.

The judgment is reversed and the cause remanded.

ALBERT HRDLICKA v. M. A. WARNER.¹

December 12, 1919.

No. 21,491.

Libel.

1. A false written charge made to the post office department that a rural mail carrier was threatening the boys of draft age along his line that they would be sent to France if they joined the Nonpartisan League is libelous per se.

Same — truth of charge — burden of proof — charge to jury.

2. Evidence that the mail carrier made to others than those included within the charge threats of the character stated, there being nothing to show that they were or likely would be communicated to the boys of draft age, did not support the truth of the charge, which was the defendant's defense; and a written statement, made by the only boy whom the defendant claimed to the investigating authorities of the post office department had been so threatened, to the effect that he had not been threatened, if erroneously received, was harmless. It was in proof of the falsity of the charge. There was no evidence of its truth, of which the burden of proving lay upon the defendant, and the jury was properly charged that as a matter of law the charge was untrue.

Same — malice — punitive damages.

3. There was evidence of actual malice which justified the submission of the question of punitive damages.

Action in the district court for Le Sueur county to recover \$10,000 for libel. The answer alleged that all the statements in the letter mentioned in the complaint were true. The case was tried before Tiff, J., who when plaintiff rested denied defendant's motion to dismiss the action, and a jury which returned a verdict for \$400. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Wright & Wright, for appellant.

Moonan & Moonan, for respondent.

DIBELL, J.

Action for libel. There was a verdict for the plaintiff. The defendant appeals from the order denying his motion for a new trial.

¹Reported in 175 N. W. 299.

1. The plaintiff was in the employ of the government as a rural mail carrier. He and the defendant lived at Elysian. The defendant wrote to the post office department at Washington the following letter:

"Elysian, Minn., May 30-18.

"P. O. Dept. U. S. A.

"Dear Sirs: Am writing this in regard to Mail Carrier on our R. Route; he is threatening some of the boys; of draft age; that live on the Route; if they join the Non-Partisan League; which is Loyal to our Government; he will have them in France before Fall; this he is doing to scare the boys from joining the League; now if you have power over him; wish you would kindly act according to what is right in this case.

"Resp.

"M. A. Warner,

"Elysian, Minn."

The court charged the jury that the letter was libelous per se. We hold that it was so. It charged the mail carrier with forbidden activities in the course of his official duties. It was necessarily injurious to him in his calling. It was seriously written and invited an investigation of the plaintiff by the government and an investigation followed. The boys of draft age were free to join the league. Threats of the kind charged, made by one in the position of the plaintiff, constituted wrongdoing and misconduct, and a charge that he made them necessarily disparaged him in his calling and lessened him in public esteem. Within our decisions the letter was libelous per se. *Sharpe v. Larson*, 67 Minn. 428, 70 N. W. 1, 554; *Martin v. Paine*, 69 Minn. 482, 72 N. W. 450; *Palmerlee v. Nottage*, 119 Minn. 351, 138 N. W. 312, 42 L.R.A.(N.S.) 870; *Beek v. Nelson*, 126 Minn. 10, 147 N. W. 668; *MacInnis v. National Herald Printing Co.* 140 Minn. 171, 167 N. W. 550, L.R.A. 1918D, 1091.

2. The defendant claims that there was error in rulings on evidence. The defense was that the charge was true.

When the local postmaster, under directions from Washington, undertook an investigation, he interviewed the defendant who stated that Hugo Zellmer, a young man in the service at the time of the trial, was the one meant by the letter. He named no other and at the trial suggested no other.

There was evidence, either offered and refused or received and after-

ward stricken, tending to show that the plaintiff had in the course of his rounds talked too freely about the league, and had made some threats to one or more persons of the general character charged in the letter, but there was no evidence that he made threats to young Zellmer, nor indeed to any boys of draft age, nor was it suggested that his loose remarks, or his threats, ever reached or were likely to reach young Zellmer or other boys of draft age. Under such circumstances, considering the specific nature of the charge and the purpose of the proof, there was no error.

The plaintiff offered in evidence and there was received a written statement from young Zellmer, obtained by the postmaster in the course of his investigation, to the effect that the plaintiff made no threat to him. It may be conceded that this was error, but it was proof negating the charge of the letter, of the truth of which there was no proof, and of the falsity of which there was proof, and so it was immaterial. Under the evidence there was no question for the jury on the issue of the truth of the charge. It was properly instructed that the charge was not true.

After a laborious consideration of all the rulings at the trial, so far as they are assailed by the assignments, we find no available error. The record is confused, and it was made so, largely by indefinite questioning and persistent and often ill-founded objections, but we have not omitted to notice the vital points.

3. There was no error in submitting the question of punitive damages. The defendant made his charges on hearsay. He made no effort to inquire of the boys whether the threats charged had been made. He made no complaint to the plaintiff. Whether there was actual malice was for the jury.

Order affirmed.

**RUDOLPH HOEL v. FLOUR CITY FUEL AND TRANSFER
COMPANY.¹**

December 12, 1919.

No. 21,515.

Negligence of garage keeper — theft of machine — burden of proof.

1. When an auto is stolen from a public garage, the burden is upon the garage keeper of proving that the loss did not come from his negligence, and this is not merely the burden of going forward with proofs, or a shifting burden, but the burden of proving to the jury that the loss did not come from his negligence.

Charge to jury — evidence.

2. The charge of the court was sufficiently favorable to the defendant, and the evidence was not such as to require a finding that there was not negligence of the defendant causing the loss.

Refusal to receive evidence.

3. The court did not err in refusing to receive evidence of notices posted about the garage, not shown to have come to the attention of the plaintiff, disclaiming liability in case of loss by theft.

Action in the district court for Hennepin county to recover \$1,000, the value of an automobile stored with defendant. The answer alleged that defendant rented to plaintiff a certain stall in his garage; that one of the conditions was that defendant would not be liable for loss of the automobile by fire or theft. The case was tried before Molyneaux, J., who when plaintiff rested denied defendant's motion to dismiss the action and when defendant rested its motion for a directed verdict, and a jury which returned a verdict for \$800. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Adolph E. L. Johnson, for appellant.

Van Fossen & Garrigues, for respondent.

DIBELL, J.

Action to recover the value of the plaintiff's auto which was kept in the defendant's garage. There was a verdict for the plaintiff. The de-

¹Reported in 175 N. W. 300.

fendant appeals from the order denying its alternative motion for judgment or a new trial.

1. The defendant operated a public garage in Minneapolis. The plaintiff kept his auto there upon an agreed monthly compensation.

On Saturday, June 30, 1917, the plaintiff called for his auto. It was not in the garage and could not be produced. He had used it last about a week before. It seems to be conceded that it was stolen.

In *Rustad v. Great Northern Ry. Co.* 122 Minn. 453, 142 N. W. 727, we had the question of the liability of the railway company defendant as a warehouseman for the loss of property in its possession. We held that the burden of proof was upon the defendant to show that the loss did not come from its negligence; that this burden was not merely the burden of going forward with proofs, nor a shifting burden, but a burden of establishing before the jury that its negligence did not cause the loss, and we referred with approval to Dean Wigmore's statement that the question of where the burden of proof should rest is "a question of policy and fairness based on experience in the different situations." In reaching our holding upon the burden of proof we followed the doctrine stated in *Davis v. Tribune Job-Printing Co.* 70 Minn. 95, 72 N. W. 808, and disapproved *Bagley Ele. Co. v. American Exp. Co.* 63 Minn. 142, 65 N. W. 264, insofar as it stated a different rule, and we expressed the view that the rule adopted was the practical working rule. There was a reversal in the *Rustad* case, and upon the retrial a charge putting the burden as stated was given and a recovery had which was sustained on appeal. *Rustad v. Great Northern Ry. Co.* 127 Minn. 251, 149 N. W. 304. In *Travelers Indemnity Co. v. Fawkes*, 120 Minn. 353, 139 N. W. 703, 45 L.R.A. (N.S.) 331, the general rule was stated that it devolved upon a bailee who had received an auto for repair and could not return it to prove that he exercised the required care.

The principle of the rule applies to the situation here. The plaintiff entrusted his auto to the defendant for storage, taking it out and using it as he chose. It was lost from the defendant's possession. The plaintiff knew nothing and could know nothing of the circumstances of its disappearance. The defendant was paid for furnishing storage, which carried with it the duty of giving some measure of care. It had men in charge of the garage giving attention to its patrons and their property.

It was or should have been in possession of such facts as could be disclosed relative to the loss.

2. There was no error in the charge of which the defendant can avail itself. It was more favorable than it rightly could demand. The evidence was not such as to require a finding that it was free of negligence and that the loss did not come from its lack of care. The evidence was only this, that the defendant could give no explanation of how the car got out of the garage. The jury, taking into consideration the manner in which the garage was conducted, could find that if care commensurate with the situation had been used it would not have disappeared.

3. The defendant offered to prove that it had posted in its garage two signs reading: "Not responsible for cars stolen or damaged by fire, wind or water." The proof was excluded on objection of the plaintiff. This was not error. We need not inquire to what extent a bailee may limit his liability by contract. So far as is shown the plaintiff did not see the signs and his attention was not called to them. The offered proof did not show a limitation of liability.

Order affirmed.

**LUCY E. POWERS v. THE FIDELITY AND CASUALTY
COMPANY OF NEW YORK.¹**

December 12, 1919.

No. 21,519.

Health and accident insurance — false statements in application — question for jury.

1. In an action to recover on a health and accident policy, whether the insured made statements in his application which were false, was, under the evidence, a question for the jury.

Same — written notice of injury — question for jury.

2. Under an insurance policy which provides that written notice of injury must be given within 20 days after the date of the accident, but failure to give such notice within that time shall not invalidate the claim if it was given as soon as reasonably possible, the mailing of a letter properly addressed to the general agent of the company, with postage paid, was sufficient to make a question of notice for the jury.

¹Reported in 175 N. W. 111.

Same—mailing notice of injury.

3. Notice of loss, in the form of a verified statement made in duplicate, one copy being properly mailed to the company at its office in New York, and the other to its authorized agent in St. Paul, so that the agent might receive the same in the ordinary course of mail within the time limited for giving such notice, is sufficient.

Same — evidence of accident sufficient.

4. The evidence considered and *held* sufficient to sustain a finding that the death of the insured was the result of an accident.

Action in the district court for Stearns county to recover \$2,000 upon defendant's health and accident insurance policy. The facts are stated in the opinion. The case was tried before Roeser, J., who when plaintiff rested denied defendant's motion to dismiss the action on the grounds that plaintiff had failed to establish a cause of action; that no notice was given to the company within 20 days after the date of the accident; that immediate notice of the alleged accidental death was not given to the company; that no proof of loss, disability or death of the assured was given within 90 days after the death of the assured, as provided by the policy; that the evidence showed as a matter of fact death was not caused solely by accidental means, but was due to disease, and that the action was brought within 60 days after furnishing proof of loss of death, and at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for the amount demanded. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

A. G. Briggs and Charles H. Weyl, for appellant.

Donohue & Quigley and W. J. Stephens, for respondent.

QUINN, J.

Action to recover on a health and accident policy issued by the defendant to Raymond J. Ziegler, in which his mother was named as beneficiary. Plaintiff had a verdict, and from an order denying its alternative motion for judgment or a new trial defendant appealed.

On April 24, 1918, Ziegler signed an application and thereafter received from the defendant a policy for \$2,000 as of that date. He died at his mother's home in Melrose, Minnesota, on July 2 following, as the

result, it is claimed, of an injury received on the twelfth day of May, 1918.

It is contended on behalf of the plaintiff that on May 12, while Ziegler was standing on a ladder engaged in the act of removing a storm window from his mother's residence, the round of the ladder on which he was standing broke, and he fell astride of the round below, thereby causing the injury which resulted in his death; that on the day following such injury Ziegler resumed his work as time-keeper for a crew of sectionmen, and so continued to work until June 23, when he was taken seriously ill as the result of such injury and died on July 2.

It is contended on behalf of the defendant: (1) That Ziegler made statements in his policy which were false and which materially affected the acceptance of the risk and the hazard assumed; (2) that no written notice of injury was given defendant within 20 days after the date of the injury; (3) that affirmative proof of loss was not furnished the defendant within 90 days after the loss; (4) that the plaintiff failed to establish that death was caused by accidental means.

1. The application contains the following: "I am in sound condition mentally and physically. * * * I have not been disabled nor have I received medical or surgical attention during the past seven years * * *." Appellant insists that these statements are false. This the plaintiff denies. The trial court instructed the jury that such representations were material to the right of the plaintiff to recover, and left it to them to say whether they were false, and that if they were plaintiff could not recover. The burden was upon defendant to show that they were not true. The evidence sustains the finding of the jury. Ziegler was less than 20 years of age and had made his home with his mother. She was assisting him in removing the window and testified as to the manner of his fall and injury; that he had always had good health; had never been sick, and had never had an accident that she knew of. In this she was corroborated by the testimony of her husband. To establish the falsity of these statements defendant offered the testimony of several witnesses. The witness Keppers testified that Ziegler worked under him for a week in March, 1918; that he saw him take medicine from a bottle and that Ziegler told him he had a touch of pneumonia the winter before. Bartell testified that Ziegler worked with him in April and May, 1918; that they

bunked in the same car; that Ziegler did not seem very lively and that his kidneys seemed to bother him. Branley testified that Ziegler told him that in the fall of 1916 or the winter of 1917, when he was using an iron crow-bar, it slipped and injured him so that he had to lay off for a day or two. All of this testimony may have been true, and yet the statements in the policy not false. Nor does the opinion testimony given by Dr. Goehrs change the situation. Whether such statements were false or true was clearly for the jury under the testimony.

2. The policy provides that written notice of injury must be given to the company within 20 days after the date of the accident; that notice given to the company at its home office, or to any authorized agent, with particulars sufficient to identify the insured, shall be deemed notice to the company. Failure to give such notice within the time provided shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice, and that it was given as soon as was reasonably possible. The plaintiff claims that she had no knowledge that her son held this policy until June 27, and that she wrote a letter on July 10, as soon as she returned from the funeral and had sufficiently recovered. It is admitted that this letter was received, but it is claimed by the company that it was not sufficient, in that it did not state that death was the result of an accident. The plaintiff testified that on July 11 her attorney drew up a notice of death by accident, a carbon copy of which was put in evidence, and that she mailed the original thereof in the post office at Melrose, addressed to the defendant's district agent in St. Paul, with postage paid thereon. Defendant denies that such notice was ever received. Where a letter is deposited in the mail, postage paid and properly addressed, there is a strong presumption that it reached its destination in due course of mail. *Ruder v. National Council K. & L. of S.* 124 Minn. 431, 145 N. W. 118. Applying this presumption the jury was justified in finding that the letter was mailed and that the notice was received.

3. It is claimed that the plaintiff failed to furnish affirmative proof of loss to the company within 90 days after death. The policy provides that such proof be furnished. The plaintiff claims that she furnished such proof in the form of a verified statement which her attorneys made in duplicate; that she mailed the original thereof to the company in New

York and a carbon copy to its agent in St. Paul on September 30, 1918. This notice was offered in evidence and received without objection. It was signed and verified by the plaintiff and contained the following statement: "Ziegler received injuries to his body and person on the 12th day of May, 1918, by accidental means, from which said injuries he died, on the 2nd day of July, 1918." Accompanying this notice was a letter signed by the plaintiff which was offered in evidence and received under objection, which it is insisted was error. This letter made reference to the notice which the plaintiff claims she mailed to the defendant on July 11, the carbon of which discloses that it contained the same statement contained in the notice of September 30. While the letter offered might have been objectionable from a technical standpoint, we are unable to discover anything therein prejudicial to the rights of the defendant under the proofs offered. The references therein were consistent with the contentions made on behalf of the plaintiff as to what had occurred with reference to notice prior to the writing of such letter. Stamped upon the policy appears the following:

"NOTICE in case of disability covered by this policy
NOTIFY ANDREW LILLEY, District Agent.
"517 Pioneer Building,
"St. Paul, Minn."

The notice mailed on September 30 was in sufficient time to have reached the agent at St. Paul in the usual course of mail within 90 days after the date of death. If the notice of July 11 was mailed as claimed, that notice would have been sufficient. The question of notice was carefully, and we think correctly, submitted to the jury by the trial court, and the verdict in this respect was supported by the evidence.

4. The policy, by its terms, insured against bodily injury through external and accidental means resulting directly, independently and exclusively of all other causes, in total disability or death. According to the plaintiff's theory the accident occurred on May 12, 1918. The plaintiff and her husband both testified that the young man, prior to that time, was strong and active and that he had never been sick.

Dr. Campbell, the family physician, testified, that he had known the young man for eight or nine years; that he prescribed for him in April and May subsequent to the issuance of the policy in question for a slight

cold, which had nothing to do with his death, and that at that time he was strong and healthy; that he treated the boy from June 23 to the time of his death; that the cause of his death was peritonitis, resulting from his fall and injury on the ladder; that he examined the discharge from the injured parts under a microscope and there was no tuberculosis about it.

Dr. Boehm testified that he had listened to the testimony upon the trial as to the accident and alleged injury of the deceased on May 12, and, assuming the same to be true, it was his opinion that the trouble was due to the injury received on the ladder, and that peritonitis was the cause of death.

Dr. Goehrs, called by the defendant, testified that the young man came to his office in the latter part of May, 1918; that he examined his person and that he told the patient that it was absolutely a surgical case, and that unless something was done it would lead to something serious; that the boy went away and he never saw him afterwards. The doctor further testified that he had heard all of the testimony upon the trial, and that, assuming it to be true as to the boy's previous condition, it was his opinion that the cause of death was tuberculosis, that the accident had nothing to do with it, and that the tubercular condition had existed for several months at least. Dr. Dunn's testimony was in corroboration of that of Dr. Goehrs as to the cause of death. There was no other medical testimony in the case.

We think that the cause of Ziegler's death, under the evidence, was a question of fact for the jury and that the verdict is sustained by the proofs. We find no reversible error in the rulings upon the admissibility of evidence, nor in the charge of the court when considered as a whole.

Affirmed.

FIRST NATIONAL BANK OF ROLETTE, NORTH DAKOTA v.
ALBERT ANDERSEN AND ANOTHER.¹

December 19, 1919.

No. 21,524.

Bills and notes — good faith of purchaser from payee.

1. A bank through its cashier purchased of the payee two notes which were given under such circumstances that the makers had a defense against the payee and that a purchaser had the burden of proving good faith and want of notice. The payee was brought to the cashier and recommended by the vice president, who was a member of the discount committee, but not active in bank affairs. The vice president was not a witness, nor was there an explanation of his absence, nor was the payee a witness, nor was there a showing why he was not.

Question for jury.

2. It is *held* that the question of the good faith of the purchasing bank was for the jury.

Action in the district court for Yellow Medicine county to recover \$850. The case was tried before Daly, J., who when plaintiff rested denied defendants' motion to dismiss the action and when defendants rested denied plaintiff's motion for a directed verdict, and a jury which returned a verdict in favor of defendants. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Affirmed.

J. N. Johnson, for appellant.

A. C. Severson, for respondents.

DIBELL, J.

Action on two promissory notes. There was a verdict for the defendants and the plaintiff appeals from the order denying its alternative motion for judgment or a new trial.

The two notes were given by the defendants to one Edwards as payee. It is conceded that they were given under such circumstances that the

¹Reported in 175 N. W. 544.

makers had a defense and that the burden was upon a purchaser to show good faith. G. S. 1913, § 5871.

Edwards took the notes to the Citizens State Bank of Minneapolis with other notes, making an aggregate of \$5,850, borrowed \$4,000 from the bank, and used these two and the other notes as collateral. Afterwards the bank, when the \$4,000 note was overdue, sold it to the plaintiff bank, and with it went the collateral. The plaintiff does not claim, as we understand from the argument, protection as an innocent purchaser from the Minneapolis bank, but it is in as favorable position as was the bank upon its purchase from Edwards. G. S. 1913, § 5870.

The cashier of the bank, one Samels, attended to the making of the loan. McGregor, the vice president and a member of the discount committee, brought Edwards to Samels and recommended him. McGregor, though a member of the discount committee, was not active in the bank's affairs. The cashier gave testimony, tending to show that the bank purchased in good faith and in the ordinary course of business. Neither McGregor nor Edwards was a witness. The question is whether the Minneapolis bank was, as a matter of law, an innocent purchaser, or whether the question of its good faith was for the jury as the trial court held it to be.

The Negotiable Instruments Act provides:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." G. S. 1913, § 5868.

The holding of the cases before the act was to the same effect. *Merchants Nat. Bank v. McNeir*, 51 Minn. 123, 53 N. W. 178; *Tourtelot v. Reed*, 62 Minn. 384, 64 N. W. 928; *Merchants Nat. Bank v. Sullivan*, 63 Minn. 468, 65 N. W. 924; *Gale v. Birmingham*, 64 Minn. 555, 67 N. W. 659.

A bank is not a bad faith purchaser because it is negligent or careless or because it does imprudent or bad banking. Its act must amount to something like fraud upon the rights of the purchaser. The absence of McGregor is not explained. It is true, as pertinently remarked by counsel for the plaintiff in his brief, that it was not "necessary for the plain-

tiff to hale all the officers, directors and agents of the Citizens State Bank into court and to call the roll and ascertain whether any of them might know of the defenses or equities existing." But McGregor was definitely connected with the taking of the note from Edwards. He knew something of the facts concerning it. It does not appear that he was acting in the interest of himself and Edwards so that his knowledge would not be that of the bank within the well understood rule stated in *First Nat. Bank v. Persall*, 110 Minn. 333, 125 N. W. 506, 675, 136 Am. St. 499, and cases there cited. It may be noted too that Edwards, who was not present at the trial, had knowledge of the transaction, and there is nothing to suggest that he was hostile to the plaintiff. Bearing in mind that the burden of proof was upon the plaintiff to show that the Citizens State Bank was a purchaser in good faith, and that neither McGregor nor Edwards was called as a witness, nor the absence of either explained, we are of the opinion that the question was one for the jury. It might draw an inference unfavorable to the plaintiff from their absence. This was the view taken by the trial court.

Order affirmed.

ANDREW M. SCHARMANN v. UNION PACIFIC RAILWAY
COMPANY.

GEORGE C. STILES, INTERVENER-RESPONDENT.¹

December 19, 1919.

No. 21,301.

Enforcement of attorney's lien — deposit in foreign court.

1. An attorney has a lien upon a cause of action arising under the Federal Employer's Liability Act for his services, and, upon settlement of the action by the parties without payment of his fees, the attorney may enforce his lien in the action in this state. The deposit of money equal to the amount of such lien in the courts of another state in no manner affects the res upon which such lien is held.

Evidence of champertous contract.

2. The evidence examined, and held to sustain the finding that the intervenor's contract of employment was not champertous and void.

¹Reported in 175 N. W. 554.

Constitution not violated.

3. It does not appear from an examination of the record herein, that the decision of the trial court is in violation of section 1 of article 4 of the Constitution of the United States.

In the district court for Hennepin County George C. Stiles moved to vacate a dismissal of the above entitled action by the plaintiff, and to reinstate the cause upon the calendar, for the purpose of enabling him to recover \$4,000 as his attorney fees and \$750 additional loaned by him to the plaintiff. The defendant company made return and answer. The matter was tried before Molyneaux, J., who made findings and as conclusion of law ordered judgment in favor of intervener for \$3,333.34. From an order denying its motion for amended findings and conclusions of law and from an order denying its motion for a new trial, defendant appealed. Affirmed.

A. G. Ellick and *Bruce W. Sanborn*, for appellant.

F. M. Miner, for respondent.

QUINN, J.

Proceeding to enforce a lien for attorney's fee against the cause of action set forth in the complaint. The case was tried to the court without a jury. Findings and an order for judgment were made in favor of the intervener and against the defendant for \$3,333.34, with interest and costs. From an order denying its motion for a new trial, defendant appealed.

While in the employ of the defendant as a locomotive engineer in the state of Nebraska, in October, 1915, plaintiff sustained an injury which resulted in the amputation of his left leg above the knee. In March, 1916, he employed the intervener, George C. Stiles, an attorney residing at Minneapolis, to bring and prosecute a suit against the defendant to recover damages for such injury, agreeing to allow him one-third of the amount recovered either by suit or settlement for his services. An action was brought in Hennepin county, Minnesota, issue joined, and the case placed upon the calendar for trial, when, in the fall of 1916, counsel for the respective parties arrived at an agreement of settlement of the action at \$12,000, which was assented to by plaintiff, and the action dismissed. For some reason the settlement was never consummated, and

in May, 1917, the plaintiff directed Mr. Stiles to bring another action to recover such damages, upon the same terms of employment. The present action was then brought, issue joined and the case placed upon the calendar for trial, when the plaintiff entered into an agreement with the defendant, settling the case for \$10,000 and dismissing it without the knowledge of plaintiff's attorney, or the payment of his fees.

In September, 1917, the railway company brought an action in equity, in the district court of Buffalo county, Nebraska, against the plaintiff, his wife Edna as conservatrix of his estate, and George C. Stiles as defendants.

In its petition the railway company alleges and sets forth plaintiff's injury; that he claimed the same was caused through the carelessness of its servants; that in October, 1916, Edna Scharmann was appointed conservatrix of the estate of her husband by the probate court of Cook county, Illinois, and given the sole charge of his estate, including any claim which he might have for damages against it on account of such injury; that said railway company denies such alleged negligence on its part; that the said Andrew M. Scharmann and Edna Scharmann as such conservatrix have settled and adjusted said claim for damages with said railway company for the sum of \$10,000; that said George C. Stiles is an attorney at law, residing in the city of Minneapolis, Minnesota, and claims an interest in the amount which may be paid to said Scharmann in settlement for such injury, by virtue of a certain contract of employment as an attorney to prosecute such claim for damages which he claims to hold, and that the amount of such claim is the sum of \$3,333.34.

It is further set forth in such petition that, in pursuance of such settlement, said railway company paid to said Edna Scharmann as such conservatrix, the sum of \$6,666.67, and now brings into court and deposits with the clerk thereof the balance of said \$10,000, to abide the decision of the court as to which of said parties is entitled thereto; that by reason of such controversy said railway company is in danger of being harassed on account of such settlement, and cannot safely pay the balance of said amount without the aid of the court in the premises, and therefore asks that all of said parties be required to interplead concerning the matters in controversy between them, etc.

A certified transcript of the record of the proceeding in the state of

Nebraska was placed in evidence, from which it appears that a summons was issued therein and served upon the defendant, George C. Stiles, therein named, at Minneapolis, Minnesota, personally on October 2, 1917, requiring him to answer to the petition therein. Stiles did not appear or answer. The other defendants answered, alleging that Stiles had no interest or claim upon the funds involved in such settlement. At a regular term of said court, on October 30, 1917, a default was entered against Stiles, and after hearing proofs the court made findings to the effect that the employment of Stiles for the prosecution and handling of the claim and cause of action referred to, was secured by him solely through his active solicitation and by virtue of an illegal and champertous arrangement, and that he had no lien upon or interest in such settlement fund.

Upon being informed of the settlement of said cause of action, Mr. Stiles applied to the district court of Hennepin county to reinstate the cause and allow him to intervene in order to enforce his lien for the value of his services in such matter against the defendant railway company. The application was granted, and the intervener filed his claim of lien for one-third of \$12,000. A hearing followed in which the defendant appeared and opposed the claim of the intervener, with the result stated.

It is contended on behalf of the appellant that the court erred: (1) In denying its motion for judgment on the ground that the respondent's contract of employment is void for champerty and maintenance; (2) in denying appellant's motion for a new trial on the ground that the decision is not justified by the evidence and is contrary to law; (3) in denying appellant's motion for a new trial on the ground that the decision is in violation of section 1, of article 4 of the Constitution of the United States.

It is conceded by counsel that if the intervener procured the handling of the case at bar through the solicitation of a layman for hire, as contended for by the appellant, the contract of employment in question is absolutely void and he has no lien upon the cause of action stated in the complaint. The trial was to the court without a jury, and the court found that the intervener did not obtain said case through an unlawful solicitation and that the contract was not champertous. A number of

witnesses gave testimony upon each side of the controversy as to how the plaintiff first came to employ Mr. Stiles to prosecute the case for him. There was a sharp conflict in the testimony bearing upon the different phases of that issue, and the here decisive question is, was there credible testimony had upon the trial in support of the findings of the trial court upon that issue? If there was, then the findings should be sustained. After a careful reading of the record we are satisfied that the weight of the testimony of the several witnesses was for the trial judge to determine. The testimony is voluminous and no particular good would be accomplished by reviewing and analyzing it here.

We discover no error in the holding of the trial court, upon the contention that the decision was in violation of section 1 of article 4 of the Federal Constitution, that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." If the employment was lawful, as determined by the trial court, then it constituted a valid Minnesota contract. The action was brought in Minnesota. The court acquired jurisdiction both of the parties and the cause of action. The services were all rendered in this state. Under the Minnesota statute, the intervener had a lien upon the cause of action for his services from the time of the service of the summons in the action. The deposit with the clerk in no manner affected the res against which Stiles sought to impress a lien. Nor did it afford a basis for the service of a summons outside of the state, so as to give the Nebraska court jurisdiction. The decree of that court was a nullity insofar as it relates to the intervener or the cause of action upon which he claims a lien.

Affirmed.

RUTH STANGER v. S. C. PANDOLFO.¹

December 19, 1919.

No. 21,309.

Contract of employment — finding sustained by evidence.

1. The evidence is sufficient to sustain a finding by the jury that there

¹Reported in 175 N. W. 912.

was a contract of employment between plaintiff and defendant, and that plaintiff was entitled to recover the reasonable value of services rendered and expenses incurred in its performance.

Same — evidence — admissible and inadmissible.

2. Plaintiff was properly permitted to testify to her employment by defendant as his agent to procure certain work to be done for him, and a letter from him to her was properly excluded as being merely a statement of the same facts as were disclosed by his testimony.

Verdict not excessive.

3. The verdict was not so excessive as to require the trial court to set it aside.

Action in the district court for Stearns county to recover \$655.13 for services and expenses incurred. The facts are stated in the opinion. The case was tried before Roeser, J., and a jury which returned a verdict for \$518.55. From an order denying his motion for a new trial, defendant appealed. Affirmed.

R. B. Brower, for appellant.

Westphal & Ochu, for respondent.

LEES, C.

Action on contract to recover for services rendered and expenses incurred, in which plaintiff had a verdict for \$518.55. Defendant appeals from an order denying a new trial. We are asked to reverse on the following grounds: (1) That the verdict is not justified by the evidence; (2) that the court erred in certain rulings on the admission of evidence; (3) that the amount of the verdict is so excessive as to indicate passion and prejudice.

1. In October, 1917, plaintiff was conducting a boarding house in St. Cloud, where defendant operated a large manufacturing establishment. She testified in substance that defendant, designing to put up a hotel near his factory for the accommodation of his employees, requested her to take charge of and manage it after completion, to make practical suggestions as it was being planned and constructed, and to secure the equipment and furnishings for it; that, at his request, she gave two and one-half months' time to the performance of these services, when defendant declined to go on with or further recognize the arrangement she had with

him, and that the reasonable value of her services was \$200 per month. She further testified that she incurred expenses amounting to \$110.13 in preparing the linen and bedding for the hotel, and furnished two rooms at her home for use as sewing rooms for six weeks while preparing it.

Defendant denied that he employed plaintiff to perform any services for him, and testified that she sought him out and represented that she wished to engage in the hotel business, had means of her own with which to do so, and desired eventually to purchase a hotel, and, if he built one, she would pay him rent on the basis of six per cent on his investment, together with taxes and other charges on the property; that in fact she had no means of her own, and, though she attempted to borrow \$2,500 from a St. Cloud bank to engage in the hotel business, she was unable to secure the loan, unless he indorsed her note, which he declined to do, and that finally she abandoned the project entirely. He admitted that she did some work and incurred some expenses in preparing to equip and furnish the hotel, and that he agreed to pay a dry goods bill to a St. Cloud merchant for goods furnished for use in the hotel, which were delivered to plaintiff, but contended that plaintiff was attempting to promote her own interests in all that she did, and had no intention of charging him for her services, until after she ascertained she could not secure any money with which to embark in the business on her own account.

There was a direct and irreconcilable conflict in the testimony of the parties. The determination of the facts in dispute was peculiarly within the province of the jury, and the plaintiff's version of her transactions with defendant having been found true and the trial court having approved of the verdict, this court is not at liberty to interfere. There was enough evidence in the case to sustain the finding of the jury in plaintiff's favor, although her testimony as to the details of the alleged agreement is vague and his denial of the arrangement to which she testified is positive and emphatic, and although his testimony was corroborated in several particulars by another witness.

2. Before commencing the action, plaintiff wrote a letter to defendant, not introduced in evidence, in which she apparently asked for a settlement. His reply to her letter was offered in evidence and excluded on plaintiff's objection. It contained a statement of what he claimed with

reference to his transactions with her and an offer to pay her a small sum of money to desist from annoying him. There was no prejudicial error in excluding the letter, for it was merely a statement of substantially the same tenor as defendant's testimony.

Plaintiff requested a Ladies Aid Society to do some sewing in preparing the bedding for the hotel. An entry in a minute book kept by the secretary of the society was offered and received in evidence over defendant's objection. The entry contained a statement that the work was done for defendant and that the bill had not been paid. It was shown that there had been no direct communication between defendant and any member of the society, and it is urged that the entry was hearsay and its admission prejudicial to defendant.

We think the court's ruling may be sustained, in view of plaintiff's testimony that she obtained authority from defendant to employ some one to help her do the sewing, that he was informed and knew that the members of the society were doing it, and that she acted for him in what she did. If her testimony was true, she was his agent and her employment of these ladies was in effect his act. *First Nat. Bank of Barnesville v. St. Anthony & Dakota Ele. Co.* 103 Minn. 82, 114 N. W. 265; *Ruppert v. Muelling*, 132 Minn. 33, 155 N. W. 1039.

3. The jury was liberal with plaintiff in awarding damages, but the verdict is not so excessive as to warrant us in reversing, for, if they took plaintiff's testimony at its face value, they might award her as much as they did. With some hesitation, we conclude that we cannot interfere with the verdict on this ground, under the rule governing our action in weighing verdicts attacked as excessive. *Gibson v. Chicago Great Western R. Co.* 117 Minn. 143, 134 N. W. 516, 38 L.R.A. (N.S.) 184, Ann. Cas. 1913C, 1263; *Gillespie v. Great Northern Ry. Co.* 124 Minn. 1, 144 N. W. 466; *Kelley v. Chicago, B. & Q. R. Co.* 142 Minn. 44, 170 N. W. 886.

Order affirmed.

THOMPSON LUMBER COMPANY v. THOMPSON YARDS, INC.¹

December 19, 1919.

No. 21,517.

Unfair competition — use of same surname — injunction.

In this action to enjoin defendant from using its corporate name in its business, in the vicinity where plaintiff was engaged in a like business, on the ground of unfair competition, it was conceded that defendant neither intended nor attempted to actively mislead the public, but it was contended that nevertheless the natural result of the use of defendant's name was to create confusion and a wrongful diversion of plaintiff's business to defendant. It is *held*:

(1) The names of the two corporations are not so similar in appearance that it may be held, as a matter of law, that the mere selection and use by defendant of its name tends to work a fraud upon plaintiff or constitute unfair competition.

(2) The findings of fact to the effect that the use by defendant of its name, in doing business in the vicinity of plaintiff, neither has caused loss to the latter nor is likely to wrongfully divert its business, and that defendant has not attempted to mislead the public, are sustained by the evidence.

(3) In determining the question of unfair competition regard may be had to the fact that the commodity handled by the parties obtains no prestige from the name of the dealer or manufacturer.

(4) A person who has acquired a business reputation may, when he participates in organizing a corporation to take over that business, lawfully permit his name to become a part of the corporate name, provided it is not so similar to that of an existing corporation that the necessary result is loss to the latter, or the selection of the name is with a view to deceive.

Action in the district court for Hennepin county to restrain defendant from using a certain trade-name in its business. The case was tried before Fish, J., who made findings and ordered judgment in favor of defendant. From an order denying its motion for a new trial or for a modification of the findings and conclusions of law, plaintiff appealed. Affirmed.

¹Reported in 175 N. W. 550.

Rose & Brill, for appellant.

Clapp & Macartney, for respondent.

HOLT, J.

The action is to enjoin defendant from conducting the retail lumber business in the counties of Hennepin and Ramsey under its name or a name containing the surname Thompson. The trial resulted in findings for defendant. A motion for amended findings or a new trial was denied, and plaintiff appeals.

Both parties were incorporated under the laws of this state; plaintiff in August, 1913, and defendant in March, 1915. A. R. Thompson, the president of plaintiff, has been engaged in the retail lumber business in Minneapolis for a period of 30 years. He first operated under his own name; later, during several years, he was associated with a son, doing business as A. R. Thompson & Son; and then in 1907, they with others organized and conducted the lumber business as a corporation named Thompson-McDonald Lumber Company. Having in 1913 sold their stock in that corporation, Thompson and sons organized plaintiff, and the former corporation changed its name to John F. McDonald Lumber Company. Plaintiff's yard is in southeast Minneapolis, and the territory it serves also includes the Midway District in St. Paul. It has a prosperous business.

For many years George P. Thompson, defendant's president and general manager, has been identified with the retail lumber business in this and adjoining states. Immediately prior to March, 1915, he had been general manager and principal stockholder of the Wells-Thompson Company, which conducted over 40 lumber yards in this state and the Dakotas. When in 1915 the promoters of defendant purchased the business and good will of Wells-Thompson Company, there was no intention to operate retail lumber yards in the counties of Hennepin and Ramsey. But in January, 1919, it bought several yards theretofore conducted in those counties by another corporation. Defendant now owns over 175 retail yards in the states mentioned and in Iowa and Montana. Its business is not confined to lumber, but includes traffic in coal and building material. The general offices of the corporation have always been at

1645 Hennepin avenue in Minneapolis. It is now capitalized at \$3,000,000; \$600,000 of which is owned by George P. Thompson.

The cause of action rests on the claim of unfair competition. The trial court found that some confusion has always existed in the mail and telephone service of the parties, growing out of the fact that the word Thompson occurs in the name of both corporations, which confusion has increased somewhat since January, 1919. It was also found that this confusion is only such as naturally exists by reason of the word Thompson being found in both names, and that it could not be substantially lessened if the word was used in a different combination and with other words than those now in the name. The court found that no substantial damage or loss of business had resulted to either party on account of the names having a word in common, and that defendant has done nothing to mislead the public into believing that its business is plaintiff's, and has not attempted to divert to itself any of plaintiff's trade. The findings are very full on these matters, but the substance thereof is that there has been no unfair competition and no attempt at deception at the expense of plaintiff. And upon the trial plaintiff's counsel stated repeatedly that no affirmative fraud or act of deception to obtain plaintiff's trade or to palm off defendant's business as that of plaintiff's was charged against defendant.

The appeal must therefore turn upon the soundness of the propositions advanced by plaintiff that the law implies fraud, whenever a party assumes a name to do business in, so similar to that of another dealer already-established in that business, that the natural tendency of the name itself is to cause confusion in the mind of the public and divert the business of the latter to the former; and, further, that the assumption of a somewhat similar name under such circumstances constitutes legal fraud, unless precaution is taken to differentiate the business of the new comer from that of the one first in the field so that the public will not be misled.

It is to be noted that the names of the two corporations do not look alike. There is sufficient dissimilarity in appearance and sound, so that it cannot be claimed that the provision of section 6147, G. S. 1913, prohibited defendant from adopting the name it bears. Each is composed of three words and of those only the first is common to both. It is said the word "yard" is ordinarily taken to mean a lumber yard. But, we do

have coal yards, wood yards, brick yards and other yards not devoted to the lumber business. The names are not so similar in appearance that the mere selection of defendant's name should in and of itself be held to work a fraud upon plaintiff, or be considered as naturally tending to wrongfully divert plaintiff's trade to defendant. Indeed, plaintiff concedes that defendant is entitled to conduct a retail lumber business under its corporate name anywhere, except that it must not do so in that name in the two counties mentioned. With this concession goes the fact that defendant has always had its main office in Minneapolis, and the confusion in the mail and telephone service was substantially as great before defendant obtained yards in these counties as it has been since. Therefore plaintiff must rely on the claim that business was, as a matter of fact, wrongfully diverted or was likely to be so diverted from it to defendant because of the latter's name.

The court found that this was not the case.

It is conceivable that one looking for Thompson Lumber Company might conclude that he had found the object of his search, if his eye caught defendant's name, for people are careless and prone to jump at conclusions. But if he had a purpose to do business with the corporation in which A. R. Thompson and sons are interested, it is not likely that he could conclude that business with defendant, without discovering that he was at the wrong place. Moreover, plaintiff is not immune from competition. Defendant has a perfect right to establish lumber yards in proximity to plaintiff's. By so doing some trade that might otherwise go to plaintiff would likely go to defendant, even though carried on under a name having no similarity whatever to plaintiff's. So that not all loss of business that plaintiff may experience, through the establishment of retail lumber yards by defendant in Hennepin and Ramsey counties, can be ascribed to the use of the word Thompson in defendant's name.

Lumber derives no peculiar virtue or salability from the reputation of either the manufacturer or dealer. Its appearance as a rule discloses its character to the buyer. With such commodity there is less likelihood that the similarity of names between rival dealers will result in financial loss to either, than would be the case of an article manufactured and handled under a well known brand or designation which has acquired an

established reputation as attached to a particular dealer's or manufacturer's name.

A person may honestly use his own name in connection with any business open to him. *Royal Baking Powder Co. v. Royal*, 122 Fed. 337, and cases there cited. A corporate name stands in a somewhat different aspect. It is often selected with an object to further the business of the corporation, and if its selection results in unfair competition toward a prior user of a similar name, there should be no hesitancy about preventing the wrong, for a corporate name is readily changed and no sentiment is as a rule connected with a corporation name. But, nevertheless, it is now well settled that an individual of an established trade or business reputation, who joins in forming a corporation to carry on such trade or business, may properly allow his name to become a part of the corporate name. It may be a business asset of value which he, as interested in the success of the corporation, has a right to bestow upon it. "Upon principle and authority we hold that every person is entitled honestly to use his own name in business either alone or associated with other in a partnership or corporation. He may not, however, use his name as an artifice to mislead the public as to the identity of the business or corporation or the article produced, and thereby unfairly divert the business of another person, partnership, or corporation, who first lawfully selected the trade-name, established a business, and produced an article which is identified by the name." *Sheffield-King Milling Co. v. Sheffield Mill & Ele. Co.* 105 Minn. 315, 117 N. W. 447, 127 Am. St. 574. "We hold that in the absence of contract, fraud or estoppel, any man may use his own name, in all legitimate ways, and as the whole or a part of a corporate name." *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. ed. 972. See also *Russia Cement Co. v. LePage*, 147 Mass. 206, 207, 17 N. E. 304, 9 Am. St. 685, and *Young & C. F. Co. v. Chaffee Bros. Furn. Co.* 204 Mich. 203, 170 N. W. 48.

In view of the above considerations we think no fraud or unfair competition can be inferred from the doing of business by defendant in its own name in the territory where plaintiff is established, and that the proof sustains the finding that there is not likely to be any substantial loss to plaintiff's business from defendant's use of its corporate name in conducting its business in the counties of Hennepin and Ramsey. We are of

the opinion that defendant's advertisements afford no ground whatever for claiming that therein may be discerned an attempt to mislead the public or to divert or wrongfully affect plaintiff's business. In short, this is a case where artifice in the selection of the name or in soliciting business must be proven in order to make out a case for injunction. The cases cited and relied on by plaintiff do not go to the extent of requiring the trial court to find that there was here either actual or constructive fraud.

Nesne v. Sundet, 93 Minn. 299, 101 N. W. 490, 106 Am. St. 439, 3 Ann. Cas. 30, involved a trade-name of a manufacturing plant. The name was not selected to perpetuate the business reputation of any one of the persons forming the corporation, but was the identical name which a copartnership was and had been using in doing business in Crookston. *Rodseth v. Northwestern Marble Works*, 129 Minn. 472, 152 N. W. 885, Ann. Cas. 1917A, 257, is an echo of the same controversy.

Sheffield-King Milling Co. v. Sheffield Mill & Ele. Co. supra, related to the methods adopted in the manufacture and sale of flour, where facts were found that the defendant made deliberate efforts to divert trade from plaintiff by the use of the word Sheffield in its name and on the flour brands and trade-marks.

In *Northwestern Knitting Co. v. Garon*, 112 Minn. 321, 128 N. W. 288, defendant, an individual, undertook to engage in the knitting business under the name of Northwestern Knitting Mill in the territory where plaintiff had an extensive business of a kindred sort. There, as in the case of *Nesne v. Sundet*, it was held that the similarity of names was such that it would naturally result in fraud and deception. The case also related to manufactured articles by a corporation of well established reputation, and the defendant, who was enjoined from adopting a trade-name similar to that of the corporation, made no attempt to incorporate his own name into the trade-name.

Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879, 882, was a case where the defendant made use of his own name in a way to mislead the public and unfairly compete with plaintiff.

In *American Clay Mnfg. Co. v. American Clay Mnfg. Co.* 198 Pa. St. 189, 191, 47 Atl. 936, the plaintiff was a Pennsylvania corporation and the defendant a New Jersey corporation that came into the former state to engage in the same kind of business as the plaintiff. The court pointed

out that the New Jersey corporation could not have incorporated in Pennsylvania under the name it bore, because of the statute forbidding the duplication of the name of the prior Pennsylvania corporation, and held that its doing business under the same name as the home corporation necessarily resulted in unfair competition entitling the plaintiff to an injunction.

Other cases cited involve active fraud and deception, or relate to dealings in commodities of established reputation wherein the manufacturer's or dealer's name plays an important part.

There are some assignments of error relating to the reception of testimony and to requested findings. They have been examined but are not deemed to be of sufficient bearing to require discussion. No prejudicial error resulted from the rulings at the trial, and the requested findings were either upon matters evidentiary or were contrary to those made and which are found amply supported by the evidence.

Order affirmed.

NORTH COAST LUMBER COMPANY v. GREAT NORTHERN
LUMBER COMPANY AND ANOTHER.¹

December 19, 1919.

No. 21,391.

Sale — delivery — when buyer's failure to pay does not relieve seller.

1. The rule that failure of the buyer to make payment when due relieves the seller from making further delivery, does not apply where the seller was in default in making delivery when the payment became due and the price of the goods had advanced and the buyer withheld only enough to protect him from loss.

Same — delivery within reasonable time.

2. Where no time for delivery is fixed, the seller must make delivery within a reasonable time.

Same — question for jury.

3. The court erred in ruling as a matter of law that plaintiff was released from its obligation to make further delivery by defendants' re-

¹Reported in 175 N. W. 547.

fusal to pay an instalment when it became due, as the evidence made a question for the jury as to whether defendants were justified in withholding this payment on the ground of an alleged prior breach of the contract by plaintiff.

Change of theory by counsel permissible, when.

4. Defendants' theory at the trial having been rejected, they do not infringe the rule against shifting position, by insisting that they are entitled to recover on the theory of the case adopted by the court.

Action in the district court for Hennepin county to recover a balance of \$2,498.77 for lumber sold and delivered. Defendants interposed a counterclaim and asked judgment for \$311.76. The case was tried before Waite, J., who at the close of the testimony denied plaintiff's motion for a directed verdict and for the dismissal of the counterclaim, and a jury which returned a verdict in favor of plaintiff for \$2,318.25. From an order denying their motion for a new trial, defendants appealed. Reversed.

Rose & Brill, for appellants.

Allen & Fletcher, for respondent.

TAYLOR, C.

On February 26, 1917, defendants gave plaintiff an order for nearly one million feet of lumber at specified prices to be shipped from Pacific Coast points and delivered at Minneapolis, Minnesota. Plaintiff accepted the order and began delivering the lumber. The price of lumber advanced materially and deliveries under the contract fell off. A controversy arose in which each party claimed that the other had breached the contract. On June 8, 1917, defendants' representative wrote plaintiff:

"You are undoubtedly aware of the fact that this lumber is worth a great deal more today than the contract price and I wish to say that inasmuch as Mr. Fleisher needs the lumber and you have refused to deliver it, and that unless you deliver the same at once or agree to deliver it within a reasonable time subject to our approval as to the date, we shall have to purchase the lumber elsewhere and hold you for the damages."

Plaintiff made no direct reply to this letter but on June 13 wrote defendants:

"Several invoices for lumber shipped you are considerably past due, and we would not care to ship you any more, until what has been shipped has been paid for in full, as we do not feel justified in extending you the credit."

On June 16 defendants' representative mailed plaintiff a check for \$2,000 and wrote:

"I am making this payment for the company in order to show the company's good faith in connection with their deal with you. Please refer again to my letter of June 8th, and advise me when we may expect the lumber we have coming. The balance we are holding back is in our opinion not more than enough to protect us on our claim against you. As soon as you have shipped the lumber or any portion thereof and will turn over to us the proper bills of lading, we will release enough of the money on hand, so that at no time will we have on hand more than enough to protect us on our claim against you."

Plaintiff refused to make further deliveries and defendants made no further payment.

The contract price for the lumber actually delivered amounted to the sum of \$14,821.57, of which defendants had paid the sum of \$12,322.80, leaving a balance of \$2,498.77 unpaid. Plaintiff brought suit for this balance. Defendants admitted the amount due, but as an offset interposed a counterclaim for damages for failure to deliver the remainder of the lumber. At the trial the court withdrew this counterclaim from the jury, and instructed them that defendants were not entitled to any offset on account thereof. Defendants challenge this ruling and insist that the evidence in support of the counterclaim made a question for the jury.

The question presented is whether the court could say as a matter of law that plaintiff was justified in refusing to make further deliveries. It may be stated as a general rule that failure of the buyer, without excuse, to make instalment payments when due, relieves the seller from his obligation to make further instalment deliveries. But this rule does not apply where the price of the goods has materially advanced, and at the time the instalment became due the seller was already in default in failing to make deliveries. Under such circumstances the buyer may withhold such an amount as is reasonably necessary to protect himself from loss, without relieving the seller from his obligation to perform the remainder

of the contract/ Hjorth v. Albert Lea Machinery Co. 142 Minn. 387, 172 N. W. 488. In the present case the contract specified no time for delivery but provided that payment should be made 60 days from date of invoice. It contained no provision for delivery in instalments or for payment in instalments, but the parties treated each carload as an instalment, the price of which was due 60 days from the date of invoice of that carload. Defendants admitted that there were instalments past due on June 13, 1917, and plaintiff contends that it was relieved from further performance of the contract by the fact that defendants were in default on that date. Defendants contend that plaintiff was in default in failing to make deliveries long prior to that date and that they were justified in withholding payment for that reason. The contract specified no time for delivery.

"Where no time of delivery is fixed the seller is obliged to make delivery within such time as is reasonable, taking into account the character of the goods, the purpose for which intended, the ability of a manufacturer to produce the goods, and the usual course of business or trade." Hjorth v. Albert Lea Machinery Co. 142 Minn. 387, 172 N. W. 488.

Defendant company, of which defendant Fleisher is president, manager and principal stockholder, was organized in December, 1916, to operate a retail lumber yard in the city of Minneapolis. That the order in question was for the purpose of stocking this yard was known to plaintiff whose principal office is also in the city of Minneapolis. Payment for the lumber had been guaranteed by Fleisher personally, and no question is raised as to his responsibility. Plaintiff makes no claim that it did not have the lumber ready for shipment, but on the contrary claims to have had it on hand at all times.

Plaintiff's claim, in substance, is that the country was at war, and, the government having taken over the railroads, it was difficult to obtain cars, and that shipments were made as rapidly as could reasonably be expected under the circumstances. Defendants presented evidence tending to show that it was not difficult to obtain cars for such shipments during this period. More than three months elapsed after the making of the contract before defendants defaulted in payment. It was plaintiff's duty to make delivery within a reasonable time. A reasonable time would be the time ordinarily required for a seller who intends faithfully to per-

form his contract to make delivery in the usual course of business under similar conditions and circumstances. We think the evidence made a question for the jury as to whether plaintiff was not already in default in failing to make delivery when defendants defaulted in making payment, and that the court erred in ruling as a matter of law that plaintiff was relieved from making further delivery by defendants' default.

Plaintiff insists that defendants have shifted their ground, that they tried the case on one theory and present it to this court on a different theory.

Defendants sent plaintiff a written order for several kinds of lumber. Plaintiff accepted the entire order, but did so in five separate letters on blank forms prepared for that purpose, each of which accepted a specified part of the order. At the trial defendants took the position that accepting the order in this manner created five separate contracts, and contended that a default in making payment under one or more of these contracts did not bar them from recovering damages under those contracts on which they had not made default. The court held, as contended by plaintiff, that the order and the several letters accepting it constituted only one contract. The correctness of this ruling is not questioned on this appeal. The court having rejected defendants' theory of five contracts and held that there was only one contract, defendants do not infringe the rule against shifting position by insisting that under the theory of a single contract the evidence in respect to their counterclaim made a question for the jury.

The order denying a new trial is reversed and a new trial granted.

ANGUS P. PRAUGHT, AS SPECIAL ADMINISTRATOR OF THE
ESTATE OF BERTHA D. PRAUGHT, DECEASED v.
GREAT NORTHERN RAILWAY COMPANY.

ANGUS P. PRAUGHT, AS SPECIAL ADMINISTRATOR OF THE
ESTATE OF ARMELLA PRAUGHT, DECEASED v.
GREAT NORTHERN RAILWAY COMPANY.¹

December 19, 1919.

Nos. 21,484, 21,485.

Negligence of driver — reasonable care required of passenger.

1. While the negligence of the driver of a vehicle is not imputed to a passenger riding therein, still the passenger is required to exercise reasonable care for her own safety.

Contributory negligence question for the jury.

2. Evidence in this case held sufficient to justify the submission of the question of contributory negligence to the jury.

Two actions in the district court for Wright county to recover for the death of plaintiff's intestates. The cases were tried together before Giddings, J., who at the close of the evidence denied defendant's motion in each case for a directed verdict, and a jury which returned a verdict in favor of defendant in each case. From orders denying his motions for new trials, the special administrator appealed. Reversed on reargument.

Henry Spindler, for appellants.

Cobb, Wheelwright & Dille and *Dille, Hoke, Krause & Faegre*, for respondent.

QUINN, J.

Two actions to recover for the death of plaintiff's intestates, caused by a collision between an automobile in which they were riding and one of defendant's passenger trains. The collision occurred at about 9:30 o'clock in the evening on August 30, 1918, at a crossing of the highway with

¹Reported in 175 N. W. 998.

defendant's railroad about one mile southeast of Monticello, in Wright county. There was a verdict for defendant in each case, and from an order denying his motion for a new trial plaintiff appeals.

The negligence charged against the defendant was, running its train at an unlawful and dangerous rate of speed and failing to give the required signals as it approached the crossing. The answers contained allegations of contributory negligence on the part of the deceased persons. It is not questioned but that there was testimony sufficient to have justified the jury in finding the defendant guilty of negligence. The trial court submitted to the jury, whether or not the two deceased persons were guilty of contributory negligence. The correctness of this instruction is the sole question here for consideration.

Defendant's line of road extends in a northwesterly direction from Albertville to Monticello, a distance of about ten miles. William, Armella and Bertha Praught, brother and sisters, aged respectively 26, 28 and 22 years, lived together upon their father's farm near Albertville and within one mile of the railroad track. The highway extends west past their home, thence north to the crossing in question. At that point the track is straight, with no obstructions, so that an approaching train might be seen from the highway where it intersects the right of way from the south for a distance of about 2,000 feet. On the evening in question, William, in company with his two sisters, started from their home in his Ford car to go to a dance beyond Monticello, the sisters sitting in the rear seat, and he alone in front driving. They traveled at the rate of from 20 to 25 miles per hour, and upon approaching the right of way slowed down to eight or ten miles. As the automobile reached the track, it came into contact with a rapidly moving passenger train from the northwest, the pilot striking the front wheel and radiator, completely demolishing the car, injuring the driver and killing the two sisters.

But two persons who witnessed the accident testified at the trial. The engineer testified that he first saw the automobile as it approached the right of way when the engine was within about six or seven hundred feet of the crossing; that the headlight was shining brightly, the bell ringing, and that he immediately sounded the whistle; that the train was running about 45 miles per hour; that when the whistle sounded the automobile came up within eight or ten feet of the track and stopped, and

that when the engine was within 60 feet of the crossing the auto started up and came into contact with the pilot. William Praught testified that it was moonlight; that when within 50 or 60 feet of the crossing he slowed down to about eight or ten miles an hour; that he then took a long look, saw and heard nothing, continued at about the same rate of speed and when within five or six feet of the track saw the train right on him; that he first saw the train when within a rod or 20 feet of the track; that his hearing was good, but he heard no signal and the headlight was dim; that both he and his sisters were familiar with the crossing, and that he knew it was about time for the train to pass; that his sisters' hearing and eyesight were good, but that they said nothing to him about the crossing nor of danger. These were all matters which the jury might properly consider in determining whether the passengers were guilty of contributory negligence. While the negligence of a driver of a vehicle is not imputable to a passenger riding therein, still the passenger is required to exercise a proper degree of care for his own safety. *Carnegie v. Great Northern Ry. Co.* 128 Minn. 14, 150 N. W. 164, and cases there cited.

It is apparent from the testimony that the engineer saw the automobile long before any of the occupants of the automobile saw the train. If it be true, as testified to by the engineer, that the automobile came to a full stop when within eight or ten feet of the railroad track, and, as the locomotive approached the crossing, suddenly started up and was instantly struck by the engine, it would be almost impossible to say that the passengers, having nothing to do with the driving of the car, could have been guilty of contributory negligence; but if, when the automobile approached the right of way, it slowed down to eight or ten miles and proceeded across the track at that rate, then, under the circumstances disclosed by the evidence, the issue of contributory negligence on the part of the passengers became a question for the jury.

In *Howe v. Minneapolis, St. P. & S. S. M. Ry. Co.* 62 Minn. 71, 77, 64 N. W. 102, the plaintiff was riding in a wagon driven by another, and was injured in a collision between the wagon and one of defendant's trains at a crossing. Plaintiff's testimony, which was the only testimony as to what he did, was that he looked both ways for approaching trains and saw none until within about 25 feet of the crossing when it was too late.

It was held that contributory negligence of plaintiff was a question for the jury.

In the case of *Finley v. Chicago, M. & St. P. Ry. Co.* 71 Minn. 471, 74 N. W. 174, plaintiff was riding with her husband, at his invitation, in a wagon drawn by his horses which he was driving. He was negligent in failing to look and listen before attempting to cross the railroad track. Held, it was a question for the jury whether she was guilty of contributory negligence in failing to look and listen or to observe that her husband was not using due care, if such was the fact. See also *Wilds v. Hudson River R. Co.* 29 N. Y. 315, 325; *Bush v. Union P. R. Co.* 62 Kan. 709, 64 Pac. 624; *Donnelly v. Brooklyn City R. Co.* 109 N. Y. 16, 15 N. E. 733; *Brickell v. N. Y. Cent. etc. R. Co.* 120 N. Y. 290, 24 N. E. 449, 17 Am. St. 648; *Bresee v. Los Angeles Traction Co.* 149 Cal. 131, 85 Pac. 152, 5 L.R.A.(N.S.) 1059; see note 8 L.R.A.(N.S.) p. 597; note L.R.A. 1915A, p. 766.

While it cannot be said in the present case that the passengers riding in the automobile were guilty of contributory negligence as a matter of law, it is our opinion that the court properly submitted to the jury the question of their negligence.

Affirmed.

HOLT, J. (dissenting).

I doubt that there is sufficient evidence in this record to support a finding that plaintiff's intestates were guilty of contributory negligence. If not it was error to submit the issue. They being dead there can be no explanation from them as to why they failed to caution the driver, and the presumption obtains that they exercised due care for their own safety. But even were it conceded that the issue of contributory negligence could be submitted, it seems to me the learned trial court prejudicially affected plaintiff by this part of the charge upon which error is assigned: "Even passengers in an automobile approaching a railroad crossing cannot sit like dumb beasts and pay no attention to their own safety or the conditions and circumstances surrounding them."

DIBELL, J. (dissenting).

In my judgment there was no question of contributory negligence of

the plaintiff's intestates for submission to the jury.

On February 13, 1920, the following opinion was filed:

PER CURIAM.

After a reargument of this cause and due consideration of the matter, a majority of the court are of the opinion that the issue of contributory negligence should be passed upon by another jury, and the order appealed from will therefore be reversed and a new trial granted. The members of the court agreeing to that conclusion are somewhat impressed with the idea that the inadvertent language of the trial court in its instruction to the jury as to the duty of decedents for their own protection in crossing the railroad track, created an adverse impression on the minds of the jury, resulting in the verdict affirming contributory negligence on their part. With a new trial and this feature of the charge omitted, no doubt a fair and impartial verdict upon the particular issue may be had, though the new trial will be had upon all the issues in the case.

Reversed.

DIBELL, J.

I concur in a reversal. I think it should be put upon a definite ground of error, and I would put it upon the ground that there was no evidence for the jury upon the question of contributory negligence.

HALLAM, J.

I concur in this.

FRANK PODGORSKI v. M. F. KERWIN.¹

December 19, 1919.

No. 21,489.

Workmen's Compensation Act — when negligent third party employer is not subject to the act.

1. To entitle a third party employer, whose negligent act causes injury to the employee of another, to the protection of the second subdi-

¹Reported in 175 N. W. 694.

vision of section 8229 (G. S. 1913), of the Workmen's Compensation Act, it must appear that the act complained of arose out of or had some relation to the business carried on by him, as to which he was an employer within the meaning of the statute.

Same.

2. The mere fact that he is an employer of labor is not sufficient to bring him within that provision of the act.

Same — employer not engaged in work of his employment.

3. Such an employer is not necessarily engaged in the work of his employment or in the conduct of the affairs thereof when going from his residence to his place of business, though he makes use of an automobile owned by him as a means of conveyance.

Same — action against third party employer after settlement with own employer.

4. An injured employee may maintain an action against such third party employer, notwithstanding a settlement had with his own employer and the payment of the amount agreed upon.

Same—effect of recovery against third party.

5. A recovery in such an action will conclude his employer and not expose the third party to a second suit.

Action in the district court for Ramsey county to recover \$21,000 for personal injuries. The case was tried before Haupt, J., who at the close of the testimony denied defendant's motion that the jury be discharged and the court take up the case for adjudication under the provisions of the Workmen's Compensation Act, and denied defendant's subsequent motion for a directed verdict on the ground that plaintiff was not the real party in interest and under G. S. 1913, § 8229, subdivisions 1 and 2, was not entitled to maintain the action, and a jury which returned a verdict for \$7,000. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Hoke, Krause & Faegre and *John S. Crooks*, for appellant.

Samuel A. Anderson, for respondent.

BROWN, C. J.

Action at law for personal injuries alleged to have been caused by the negligence of defendant. In addition to joining issue on the allegations of negligence and the nature and character of plaintiff's injuries, defendant interposed by way of special defense a claim that the rights and lia-

bilities of the parties were controlled by the Workmen's Compensation Act, and that if plaintiff was entitled to any relief for the injury complained of the measure thereof was the amount fixed by that act. This defense was, by the rulings of the trial court and the verdict of the jury, entirely eliminated from the case, and an award of general damages given plaintiff in the sum of \$7,000. Defendant appealed from an order denying a new trial.

The facts are substantially as follows: At the time of the injury in question plaintiff was in the employ of the People's Coal & Ice Company, a corporation doing the business indicated by its name in the city of St. Paul. Both were under and subject to the compensation act. At about 7:30 o'clock on the morning of September 16, 1918, plaintiff in the due course of his employment was engaged in the delivery of a load of coal at the residence of a customer of his employer. The truck on which the coal was carted to the place of delivery while being unloaded was stationed in the public alley in the rear of the residence where delivery was being made.

Defendant was then and for some time prior thereto had been engaged as an individual in the wholesale paper trade, and as to his employees was subject to the compensation act. At the time of the accident defendant had started on the way to his place of business in another part of the city, using his automobile as a means of conveyance, and negligently ran into and injured plaintiff while he was so engaged in the delivery of the coal as just stated.

Plaintiff's employer, the coal and ice company, was protected from losses of this kind by indemnity insurance, and subsequently entered into an agreement of settlement with the plaintiff, the insurance company concurring therein, by which plaintiff's compensation under the statute was agreed to and thereafter paid to him in monthly instalments; such payments were being made at the time of the commencement and trial of this action.

Under the several assignments of error defendant contends: (1) That the rights of the parties on the facts presented are controlled by the compensation act; (2) that the damages awarded by the jury are excessive; and (3) that plaintiff's counsel was guilty of misconduct in his address to the jury, for which a new trial should be granted.

1. The provisions of the compensation act which are involved, and upon which defendant relies in support of the first contention, are those dealing with the rights and liabilities of third persons who negligently cause injury to the employees of another. G. S. 1913, § 8229, covers the subject in two subdivisions; the first of which treats of the third person negligently causing such an injury, who, as to his own servants and employees, is within and subject to the act; the second with the third person causing a like injury, who is not within or subject to the act.

The primary inquiry upon this branch of the case is whether on the facts disclosed by the record, which are not in dispute, defendant is in position to invoke the protection of the statute in defense to the action, or in reduction of the amount of the recovery given by the jury. In other words, whether he was on the particular occasion and at the time of the injury "subject to the provisions of the act," within the meaning and intent of the statute. The trial court ruled adversely to defendant, and held that he was not as to this transaction within the act, and therefore not entitled to its benefits or protection.

The question is not perhaps entirely free from doubt, but a careful consideration of the question leads us to the conclusion reached by the court below. By the terms of section 8203, where both the employer and the employee are subject to the act, the latter is entitled to compensation for an injury received during the course of his employment, without regard to the question of negligence on the part of the employer; compensation follows from an accidental injury. Under subdivision 1 of the section under consideration, an employer who is within the act is made liable for compensation for injuries to the employees of another employer, where the injury is caused under circumstances creating a legal liability against him; in other words, the employer who is subject to the act is liable for compensation in such case only where his act creates a legal liability against him, which necessarily excludes accidental injuries. While the statute makes it clear that in either case the injury for which compensation is given must, as to the employee, arise out of and in the course of the employment, there is no express provision prescribing when and under what circumstances the third party employer may or may not claim the benefits of the limited liability thus imposed upon him; it does not prescribe that to be entitled to the protection of the statute he must

show that the act causing the injury was committed at a time when he was engaged in the affairs of his own employment. But we think, though the statute is silent upon the particular point, that it should be so construed.

It seems clear that the legislature did not intend to extend the protection of the statute to the culpable third party employer, merely because he happened to be an employer of labor, and as to his own employees within the statute. No reason occurs to us why such an employer should receive protection from a negligent injury occasioned while in the pursuit of his personal affairs, wholly disconnected with and unrelated to his business employment, as upon a pleasure drive with his automobile on a holiday or of a Sunday. It is a well known fact that business concerns, through their servants and employees, have frequent and almost daily transactions with each other in the delivery of commodities by one to the other, which necessarily expose their employees to injury when upon or about the premises of the employer with whom such transactions are had, as well as when the employees come in contact with each other in the discharge of their duties elsewhere. This was well understood by the legislature when framing and enacting the statute, and we conceive the purpose of that body to have been to limit the liability of the third party employer to injuries arising from relations of that kind, and not to extend to him a blanket exemption from liability for his wrongful acts, based on the naked fact that he occupies that relation to industrial life. *Hade v. Simmons*, 132 Minn. 344, 157 N. W. 506. We so construe the statute, from which it follows that the limited liability is not available to defendant, unless the act causing the injury here complained of had some relation to and connection with the business which he then carried on, as to which he was an employer within the meaning of the law. That question, in the light of the rule of the law as applied to the employee in a similar situation, is not difficult to answer.

It is a well settled general rule that an injury suffered by an employee, in going to or returning from the employer's premises where the work of his employment is carried on, except in special instances not here involved, does not arise out of his employment and entitle him to compensation. 1 *Honold*, *Workmen's Compensation*, 105 and 107, and authorities there cited. The same rule should apply to the employer, and

negligent acts committed by him in the careless operation of an automobile, which he employs in going to and returning from his business premises, should be held not within the protection of the statute. Such is this case. Plaintiff had just started in his automobile for his place of business, and before reaching the public street negligently ran into and injured plaintiff. He was not then upon or near his business premises, and the use of the automobile as a means of conveyance thereto had no relation to the conduct of the business there carried on.

We therefore hold that, since the injury complained of did not arise out of the conduct of defendant's business, he is not entitled to the benefit of the limited liability fixed by the compensation act. *Hade v. Simmons*, supra. We have been cited to no case directly in point. In *Winter v. Peter Doelger Brewing Co.* 95 Misc. 150, 159 N. Y. Supp. 113, it was held that an employer in a given case might, as to his own employees, occupy the position of a third party employer within the statute. The decision was based on the fact that the injury there complained of did not arise out of the particular employment in which both the employee and employer were engaged. But on the facts of the case at bar we find no difficulty in following the rule stated even in the absence of all-four precedents.

2. The further contention of defendant that, though the case comes within the second subdivision of the third party provisions of the act, plaintiff cannot maintain the action, for the reason that the settlement for his injuries with his employer, and the payment of the amount agreed upon, operated by force of the statute to transfer his right of action to his employer. The contention is not sustained. The right of action against the third person not subject to the act is expressly given to the employee, notwithstanding settlement has been made with his employer. The statute is clear on the subject, and a recovery in such an action necessarily will conclude all parties and not expose the third party to a second suit. Such is the rule in practically all of the states having statutory provisions similar to our own. *Book v. City of Henderson*, 176 Ky. 785, 197 S. W. 449; *Gones v. Fisher*, 286 Ill. 606, 122 N. E. 95; *Rogers v. Illinois Cent. Ry. Co.* 210 Ill. App. 577. In *Carlson v. Minneapolis St. Ry. Co* supra page 129, 173 N. W. 405, the defendant was subject to the

act. The cases cited by defendant from Illinois are not in point, as shown by *Gones v. Fisher*, *supra*.

3. The other points made by defendant do not require discussion. We have considered them with care and discover no reason for interference with the verdict. The damages may be large, but the evidence as to the character of the injuries was conflicting, presenting a question for the jury. The trial court has approved the verdict. We find no substantial merit in the claim of misconduct on the part of plaintiff's counsel.

Order affirmed.

A. F. MIDDELSTADT AND ANOTHER v. JULIUS H.
KOSTENDICK AND ANOTHER.¹

December 19, 1919.

No. 21,498.

Mechanic's lien — findings sustained — attorney's fee.

In this action to foreclose a mechanic's lien, the evidence sustains the findings that plaintiffs had substantially performed their contract, so that what small defects existed could be remedied at a cost of not to exceed \$25; that the time for completing the contract had been waived by defendant; and that certain extra work had been done for which additional compensation should be made. There was no abuse of discretion in allowing \$65 as attorney's fees for foreclosing the lien.

Action in the district court for Sherburne county to foreclose a mechanic's lien and recover \$117.50. The facts are stated in the opinion. The case was tried before Giddings, J., who made findings and ordered judgment in favor of plaintiffs for \$92.50, and ordered a sale of the premises to satisfy the lien. From an order denying their motion to amend the findings or for a new trial, defendants appealed. Affirmed.

Frank T. White, for appellants.

Charles S. Wheaton, for respondents.

¹Reported in 175 N. W. 553.

HOLT, J.

Action to enforce a mechanic's lien. Defendants appeal from the order refusing to amend the findings and denying a new trial.

Plaintiffs undertook to do the work in erecting a dwelling and barn on defendants' farm. The price for the work was \$900. Defendants were to do the excavating for the cellar and foundation and furnished all the needed material. The house and barn were built, and plaintiffs were paid \$800. Defendants refused to pay the remainder, on the ground that the work had not been performed as agreed nor within the time fixed. Plaintiffs filed their lien for the balance and for some extras. In the answer defendants counterclaimed for the delay and for defects. The court found that the contract had been substantially performed, except for minor omissions and defects which could be remedied at a cost not exceeding \$25; that extra work was done of the value of \$17.50; that defendants have waived the time limit of the contract; and allowed a lien and recovery for \$92.50, together with interest and costs, including an attorney's fee of \$65.

The doctrine of substantial performance of a contract as stated in such cases as *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309, and *Snider v. Peters H. B. Co.* 139 Minn. 413, 167 N. W. 108, was, without doubt, properly applied here. Defendants' expert testified that it would cost only \$32.75 to remedy the omissions or defects in this \$900 job. The court found it would not exceed \$25. Taking into consideration the great amount of work done under the contract, and the small sum required to remedy the defects therein, the conclusion is hardly to be avoided that there was a substantial performance.

The court's finding that the delay in completing the work was waived is sustained. Plaintiffs testified that, owing to illness and death of a member of defendants' family, in the old home situate close to the buildings plaintiffs were erecting, they, at defendants' request, left off working for three weeks.

Defendant objects to the extras allowed. As to the five dollars allowed for priming the barn, it is sufficient to say that it was apparently a needful work, that defendants acquiesced in it being done, and the specifications are silent in respect to who was to do it. The inference is warranted that this priming was extra work which defendants impliedly

promised to pay for. The \$12.50 were allowed under these facts: The specifications call for a concrete foundation seven feet deep. At one corner of the building was a sink hole or soft spot of ground, so that it was there necessary to go four feet deeper than where it was solid ground, in order to find adequate support for the foundation. The additional concrete work thereby necessitated, defendants claim plaintiffs should construct without compensation, and they cite *Stees v. Leonard*, 20 Minn. 448 (494); *Nash v. City of St. Paul*, 23 Minn. 132; *St. Paul & N. P. Ry. Co. v. Bradbury*, 42 Minn. 222, 44 N. W. 1. The facts in those cases are not like the ones here. Defendants were to do the excavating for the foundation. Plaintiffs had to follow the excavation so made. When defendants deemed it necessary to dig deeper than the specifications provided for the foundation wall, at this particular point, they tacitly invited or requested plaintiffs to construct the wall to that depth, and the court could well find that this addition to the wall was extra work authorized by defendants and for which reasonable compensation should be paid.

Error is assigned on the allowance of \$65 as attorney's fees. The law permits the court to award reasonable attorney's fees for foreclosing a mechanic's lien. Section 7032, G. S. 1913, as construed in *Schmoll v. Lucht*, 106 Minn. 188, 118 N. W. 555. It cannot be claimed that the amount awarded is exorbitant for the work actually performed by the attorney. It only appears large when considered in connection with the smallness of the lien claimed. But the amount of attorney's fees rests in the sound discretion of the trial court. Defendants presented many defensive issues which they tenaciously sought to maintain. All things considered, we are unable to say that the sum allowed as attorney's fees is so excessive as not to be within the limits of the trial court's discretion.

The order is affirmed.

EMMA F. NASH, AS ADMINISTRATRIX v. MINNEAPOLIS &
ST. LOUIS RAILROAD COMPANY.¹

December 19, 1919.

No. 21,549.

Workmen's Compensation Act of Iowa — when employer gains no protection.

1. To entitle an employer to the benefits and protection of the Workmen's Compensation Act of the state of Iowa, he must comply with the insurance provisions thereof, and insure the liability thereby created within the time therein provided; a failure to do which will expose him to liability to the same extent as before the compensation law was enacted.

Same — when act became effective.

2. The insurance provisions of that act took effect and became operative and in force on July 1, 1913.

Same — order not retroactive — action at law.

3. An order relieving the employer from the insurance provisions of the act, which is authorized on a showing of solvency and ability to pay, can have no retroactive operation, and does not affect or impair a right of action at law which accrued to an employee or his next of kin prior to the date when the employer became subject to the act.

After the appeal reported in 141 Minn. 148, 169 N. W. 540, the case was tried before Dickson, J., who at the close of plaintiff's testimony denied defendant's motion to dismiss the action and at the close of the testimony defendant's motion for a directed verdict, and a jury which returned a verdict for \$6,000. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

M. M. Joyce and *R. B. Alberson*, for appellant.

Humphrey Barton, for respondent.

BROWN, C. J.

Plaintiff's intestate on the seventh day of July, 1914, was and for some

¹Reported in 175 N. W. 610.

time prior thereto had been in the employ of defendant in the state of Iowa as a member of one of its bridge crews. On that day at Marshalltown in that state he received an injury while engaged in the discharge of the duties of his employment, from which he died a week later, or on July 15, 1914. This action was thereafter brought in this state to recover for his death, and by the original complaint was founded on the Federal Employer's Liability Act. Plaintiff recovered a verdict which was sustained on appeal to this court. *Nash v. Minneapolis & St. Louis R. Co.* 131 Minn. 166, 154 N. W. 957. But on writ of error to the Supreme Court of the United States our judgment was reversed, the holding of that court being that the facts did not bring the case within the Federal statute. 242 U. S. 619, 37 Sup. Ct. 2, 39, 61 L. ed. 531. On remand of the cause to the state court plaintiff amended her complaint, charging negligence on the part of defendant of a character to render it liable under the statute law of Iowa. *Nash v. Minneapolis & St. L. R. Co.* 141 Minn. 148, 169 N. W. 540. To the amended complaint defendant interposed the defense that both parties were, at the time of the injury and death of decedent, under and subject to the Workmen's Compensation Act of the state of Iowa, and that the compensation there prescribed is the measure of plaintiff's relief. Plaintiff joined issue on the defense, claiming that, by its failure to comply with certain provisions of the Iowa statute, defendant was not within the same nor entitled to the protection thereof, and was liable for the alleged wrongful death of decedent under the general liability statute of that state as construed and applied by its courts.

On the trial of the action the defense so pleaded was wholly eliminated by the rulings of the court, and plaintiff was awarded a verdict in the sum of \$6,000. Defendant moved for judgment notwithstanding the verdict, which was denied. There was no motion for a new trial. Judgment was entered on the verdict and defendant appealed.

The only question presented by the appeal is whether on the facts disclosed by the record which are not in dispute, the rights of the parties are controlled by the Iowa compensation law. We answer the question in the negative.

The Iowa act, consisting of numerous sections comprehensively dealing with the subject, is divided into three separate parts, namely, part 1,

part 2 and part 3. The first deals with the workman's injuries, received in the course of his employment, the employer's liability, and the compensation to be paid; the second part creates the office of industrial commissioner to execute and administer the law, and the third part imposes the performance of certain things upon the employer as a condition precedent to the right of protection under the act. The statute will be found in the Iowa Code 1913 Supp. §§ 2477m-2477-m51. The only provisions thereof which are pertinent to the questions involved are contained in sections 2477-m41 and 2477-m49, of the third part, the first of which for the purpose of clearness we quote in full. The section reads as follows:

"Every employer subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance. Every such employer shall within thirty days after this act goes into effect exhibit on demand of the state insurance department evidence of his compliance with this section; and if such employer refuses or neglects to comply with this section, he shall be liable in case of injury to a workman in his employ under part one of this act."

Section 2477-m49 provides that an employer coming within the act may be relieved from the insurance obligation imposed by the section just quoted, by a showing satisfactory to the state insurance department and the industrial commissioner, appointed under part 2 of the act, of his solvency and ability to pay all claims arising against him under the act, or by depositing adequate security for such payment. On July 21, 1914, defendant made application under that section for the relief there provided for and it was granted by the insurance department and the industrial commissioner.

The principal contention on the trial below was that the failure of defendant to procure the insurance did not expose it to liability for injuries sustained by its employees, except to the extent of the compensation fixed by part 1 of the act, stress being laid upon the penalty clause of the above quoted section, namely, "that the failure of the employer to procure the insurance shall render him liable to any injured workman under part one of this act." But the point since the trial of the action has been disposed of by the Iowa supreme court adversely to defendant's contention in the

case of *Elks v. Conn*, 185 Iowa —, 172 N. W. 173, where the particular provision of the statute was before that court for construction and interpretation. It was there held that the failure to comply with the statute renders the employer liable to the same extent as though the compensation act had not been enacted. It is conceded that the decision and the construction there given the statute is final and binding on the parties, and no further reference to that branch of the case need be made.

This leaves as the only remaining matter for consideration the question whether the order of the insurance department and industrial commissioner relieving defendant from compliance with the insurance feature of the statute, made subsequent to the injury and death of decedent, can have the effect of barring plaintiff's right to recover at law, or in reduction of defendant's liability to that fixed by the compensation act. In our view of the Iowa statute the question is not open to serious debate. It is clear, under the general rule pertinent to facts like those here presented, that the order of the insurance department can have prospective operation only, and as a protection to defendant in respect to injuries thereafter suffered by its employees, and not in destruction of rights of action against the company which accrued prior to the date it was issued. Such is the presumption of law in the absence of clear language showing an intention to the contrary. We find no such language, either in the statute authorizing the order, or in the record of the order itself as presented by the settled case. Plaintiff's right of action accrued and became vested on the fifteenth day of July, 1914, the date of the death of decedent, a week prior to the order, and under the rule stated is wholly unaffected thereby. 25 R. C. L. 786; *McManus v. Duluth, C. & N. R. Co.* 51 Minn. 30, 52 N. W. 980; *Parkinson v. Brandenburg*, 35 Minn. 294, 28 N. W. 919, 59 Am. Rep. 326; *Powers v. City of St. Paul*, 36 Minn. 87, 30 N. W. 433. But defendant contends that the statute as a whole did not go into effect until July 4, 1914, and that defendant had 30 days thereafter either to procure the insurance or to apply to be relieved therefrom, and since it was relieved within that period the act became operative and controls the rights of the parties at bar. This contention is not sustained.

By the express terms of the act, part 3 thereof, which includes the insurance features of the law, was made to take effect and be of force

on July 4, 1913, and the clause of the insurance section by which the employer is required on demand to exhibit evidence of compliance therewith within 30 days "after this act goes into effect," cannot well be construed as applying to the date when part 1 was made to take effect, namely, July 1, 1914. We need not stop to speculate upon the possible reasons prompting the legislature in the enactment of the act to designate different dates for the taking effect of the separate parts thereof, for the fact remains that part 3, the only part here materially involved, was expressly made to take effect and become operative from and after July 4, 1913, and that was the date from which all employers desiring to take advantage of the law were required to take such steps as were necessary to bring them within its protection.

This covers the case and all that need be said in disposing of the case. Our views are in harmony with those of the learned trial judge and the judgment appealed from is affirmed.

STATE EX REL. E. E. SANDQUIST v. DISTRICT COURT OF
BLUE EARTH COUNTY.¹

December 19, 1919.

No. 21,552.

Constructive criminal contempt — bribing witness to leave the state.

1. A proceeding instituted to punish the defendant in a criminal case for contempt of court committed by him in attempting to induce the complaining witness against him to leave the state and not appear before the grand jury, is one involving a constructive criminal contempt.

Criminal contempt — defendant cannot be called as witness for cross-examination.

2. The rules of evidence applied in criminal cases should be observed at the hearing in a proceeding in which a person is accused of a criminal contempt, and he cannot be called as a witness for cross-examination under either section 8362 or 8377, G. S. 1913, and compelled to testify against himself.

¹Reported in 175 N. W. 908.

Same — constitutional immunities.

3. The immunity conferred upon defendants in criminal cases by section 7, article 1, of the state Constitution, and by the Fifth Amendment to the Constitution of the United States, extends to prosecutions for criminal contempts.

Upon the relation of E. E. Sandquist the supreme court granted its writ of certiorari directed to the district court for Blue Earth county to review the proceedings in that court, Comstock, J., convicting relator of contempt of court. Reversed.

Regan & Grogan, for relator.

Clifford L. Hilton, Attorney General, and *C. E. Phillips*, County Attorney, for respondent.

LEES, C.

Relator was convicted of a contempt of court not committed in the presence of the court, fined \$50 and committed to jail for 30 days in default of the payment of the fine.

The case is brought here by writ of certiorari. The court permitted the state to call the relator for cross-examination under the statute and to examine him as a witness against himself. This is assigned as error, and we are of the opinion that it was and that there must be a reversal on this ground.

Relator was arrested on the complaint of the mother of a girl 17 years old, charging him with the crime of having carnal knowledge of her daughter. A preliminary hearing was had in the municipal court of Mankato, and relator was committed for trial in the district court of Blue Earth county. The mother and daughter were notified by the county attorney that they would be required as witnesses before the grand jury and were requested not to leave the state. Later on, A. H. Lillygren and Lydia Franklin interviewed the mother and daughter and endeavored to persuade them to drop the criminal prosecution against relator, informing them that, if they would do so, he would furnish them with railroad tickets for their return to their former home in Mississippi and pay them \$200. Lillygren produced a typewritten document previously prepared and asked the daughter to sign it, and she did so. It contained a state-

ment that the testimony she had given against relator at the preliminary hearing was not true.

These facts were set forth in the affidavit of the county attorney of Blue Earth county, on which the district court of that county ordered relator and Lillygren and Mrs. Franklin to show cause why each of them should not be adjudged guilty of contempt of court. The sheriff brought them before the court where they were represented by counsel, who contended that they were charged with a criminal contempt and that the state had the burden of proving their guilt. The court ruled that it was incumbent upon the accused to purge themselves of contempt and, in response to an inquiry made by counsel, said: "This court finds a justification in the moving papers for the citation and, in the absence of any proof to the contrary, shall find them guilty of the contempt of process of the law." The accused then offered their own affidavits in evidence, whereupon the following colloquy occurred between the court and counsel:

Court. Have the respondents anything further to offer?

Mr. Regan. We would like to have the examination of the complaining witnesses in the case.

Court. I do not understand your suggestion. What have they to offer?

Mr. Regan. We are asking for the state to produce whatever testimony they have got and if it is necessary then we have testimony to submit to the court on this matter.

Court. Call respondents for cross-examination, Mr. Phillips.

The county attorney then called each of the respondents for cross-examination under the statute. When Lillygren was called, this occurred:

Mr. Regan. We, at this time, wish to claim our proper exemption under the statute and object to this witness being compelled to testify against himself.

Court. A while ago you were invoking the statute that you argued required the court to examine these parties, and you asked for an examination of these parties.

Mr. Regan. That is true, your honor, * * * that is the reason I say we have a right to hear any testimony that is against us before we are compelled ourselves to take the stand in our own behalf. The defendant cannot be presumed, in any case, of being guilty, and compelled to prove himself innocent.

Court. The fault, Mr. Regan, is that your mind is running along the lines of criminal contempt and within the rules of trial. These parties are not charged with criminal contempt. This is not a trial. This is a summary proceeding, in which the court is bound, under the statute, to examine the parties, and this examination is being conducted along the lines called for in that procedure.

Mr. Regan. Exception.

Relator was next called for cross-examination under the statute. His counsel objected to any testimony being taken relating to the case in which he had been bound over to the grand jury. The court ruled that his testimony relating to matters then under inquiry might properly be taken, and he was then subjected to an extended cross-examination touching his connection with the contempt of court with which he was charged.

We are of the opinion that the proceeding was one in which the accused were charged with a constructive criminal contempt. Assuming that the affidavit upon which the proceeding was based sufficiently charged relator with acts constituting a contempt of court, such acts did not consist in a failure to do something ordered by the court to be done for the benefit of a party to an action, but were directed against the dignity and authority of the court. Under our decisions acts of such a character constitute a criminal contempt. *State v. Ives*, 60 Minn. 478, 62 N. W. 831; *State v. District Court of Hennepin County*, 65 Minn. 146, 67 N. W. 796; *State v. District Court of Hennepin County*, 71 Minn. 383, 73 N. W. 1092; *State v. Smith*, 116 Minn. 228, 133 N. W. 614; *Red River P. G. Assn. v. Bernardy*, 128 Minn. 153, 150 N. W. 383; *State v. Searles*, 141 Minn. 267, 170 N. W. 198. A proceeding for the punishment of such a contempt is in its nature a criminal proceeding, and should conform substantially to proceedings in criminal cases. *State v. District Court of Hennepin County*, *supra*; *Red River P. G. Assn. v. Bernardy*, *supra*.

Section 8362, G. S. 1913, provides that, when the accused has been brought into court, the court shall investigate the charge by examining him and the witnesses for and against him. The language of the statute and the reference to it in *State v. Ives*, *supra*, naturally led the trial judge to conclude that relator might be called for cross-examination as a witness against himself. But the constitutional guaranty, state and national, that no person shall be compelled, in any criminal case, to be a

witness against himself, forbade the calling of relator by the state as a witness for cross-examination under either section 8362 or 8377, G. S. 1913. The courts have always jealously guarded this guaranty of the bill of rights, and these provisions of the statute are not to be construed as taking away or impairing a right secured to all persons by section 7, article 1, Minnesota Constitution and the Fifth Amendment to the Constitution of the United States. *State v. Froiseth*, 16 Minn. 260 (296); *State v. Thaden*, 43 Minn. 253, 45 N. W. 447; *State v. Gardner*, 88 Minn. 130, 92 N. W. 529; *State v. Drew*, 110 Minn. 247, 124 N. W. 1091, 136 Am. St. 491; *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. ed. 1110.

While it is true that relator did not refuse to testify when called for cross-examination and his counsel did not object on the specific ground that he could not be compelled to testify against himself, it is nevertheless apparent, from the portions of the record we have quoted, that the point had been brought to the court's attention before relator was called as a witness, and that, over objection, it had ruled that all three of the accused persons were subject to cross-examination under the statute. Relator is, therefore, entitled to urge that there was error in the proceedings in the respect mentioned, which was prejudicial to his substantial rights, and the judgment against him must be reversed.

Judgment reversed.

BEN HANSEN v. DULUTH & IRON RANGE RAILROAD
COMPANY.¹

December 19, 1919.

No. 21,569.

Master and servant — evidence of foreman's negligence insufficient.

The plaintiff was engaged in thawing out ore in an ore pocket in the defendant's dock, using a hose which extended over the rail of a track. The foreman told him that a train was coming in on his track and to take out the hose. It was his duty to take out the hose when a train came in on the track on which he was working and this he

¹Reported in 175 N. W. 549.

would do without a direction when he saw a train coming. While endeavoring to take out the hose, moving hurriedly, it being night-time and the atmosphere misty because of the accumulated steam, he made a misstep and fell into the ore pocket and was injured. It is held that the direction of the foreman was not negligent.

Action in the district court for Lake county to recover \$15,000 for personal injuries while in the employ of defendant. The answer alleged that the injuries were caused by the negligence of plaintiff and he assumed the risks and dangers he encountered at the time of the accident. The case was tried before Freeman, J., who when plaintiff rested granted defendant's motion for a directed verdict on the grounds that no negligence of defendant had been shown; that no negligence of defendant had been shown causing proximately the accident to plaintiff; that it affirmatively appeared that plaintiff's own act was the sole cause of his accident and injury, and that it affirmatively appeared that plaintiff assumed the risks of the dangers which he encountered at the time of the accident. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

Andrew Nelson and John Cedergren, for appellant.

Howard T. Abbott, and Abbott, MacPherran & Gilbert, for respondent.

DIBELL, J.

Action for personal injuries. The court directed a verdict for the defendant. The plaintiff appeals from the order denying his motion for a new trial.

The plaintiff, Ben Hansen, was working for the defendant railroad company on its ore docks at Two Harbors. The ore is automatically unloaded from the bottom of the ore cars into the pockets underneath. There are no cross-ties between the two rails of a track, but some 12 feet apart heavy timbers or cross planks two feet wide are laid. They separate the pockets and are used by the men in going across. Between the different tracks the dock is solidly planked.

The plaintiff was thawing out ore in the pockets. It was the night of December 5, 1917, and it was cold and windy. In thawing the ore steam was used. It was gotten from a nearby engine on another track through a rubber hose some 50 feet long equipped with a five foot metal nozzle.

The plaintiff worked from the cross-plank and stuck the nozzle well into the mass of ore. The use of steam made the atmosphere misty and it was difficult to see. Cars of ore came in from time to time and might come upon a track where one thawing ore was working, and in such event he took out his hose and yielded to the ore train.

After properly adjusting the nozzle the plaintiff went over to the pilot of the engine which supplied the steam and stood there some minutes while the steam was doing its work. When there the foreman, who was somewhere about but not in sight, hallowed to him: "Hansen, get that hose out of there; there is a train coming in on that rail." The plaintiff then went to the cab and had the engineer shut off the steam. He then saw "the shining bottom or flange of the wheels rolling towards me about as fast as a man could walk," and about 50 or 60 feet away. He could not see the tops of the cars because of the mist and smoke. The cars were coming on the track over one rail of which the hose extended. This is the last we hear of the incoming cars. So far as the record shows they were not seen afterwards nor did the plaintiff look for them. He went from the engine over to the ore pocket and was in a hurry. He intended to step upon the cross-plank and pull out the hose. He mistook its position and stepped into the pocket and fell and was injured.

The negligence claimed is the giving by the foreman of the direction which we have quoted. We find none. Not to give some warning might well enough have been negligence. It is claimed that the direction was given in a loud and commanding way. That the direction was given in a loud voice does not indicate negligence. That it was given in a commanding tone is not of particular significance. There was no negligent sending into a place of danger. Counsel for the plaintiff cite the following cases in support of their claim that the direction was a negligent one. *Johnson v. Minneapolis G. Ele. Co.* 67 Minn. 141, 69 N. W. 713; *Stephens v. Hannibal, etc. R. Co.* 96 Mo. 207, 9 S. W. 589, 9 Am. St. 336; *Illinois Cent. R. Co. v. Atwell*, 198 Ill. 200, 64 N. E. 1095; *Pickett v. Quincy, etc. R. Co.* 156 Mo. App. 272, 137 S. W. 636; *Missouri, etc. Ry. Co. v. Freeman* (Tex. Civ. App.) 168 S. W. 69; *Hogan v. Pennock*, 216 Mass. 274, 103 N. E. 831. We have examined all of them. Quite generally they involve situations where one is injured by a train in front of which he is directed to work. We do not regard the case at bar as coming

within the principle of the cases cited. No more serious consequence would result from not taking out the hose than the cutting of it in two. It was not the case of a justifiable exposure to danger upon the command of a superior in an effort to save property. Sensibly construed the so-called demand was nothing more than a warning. The plaintiff, seeing the cars coming, would have endeavored to take out the hose, just as he did, without a warning or direction. He was injured in the faithful discharge of his duties which exposed him to considerable danger with weather conditions as they were. The direction of the foreman was not the negligent cause of his injury, and it is difficult not to believe that the plaintiff is mistaken in some of his facts.

Order affirmed.

HANS ALLEN v. ARNOLD E. JOHNSON.¹

December 19, 1919.

No. 21,577.

Negligence — contributory negligence — verdict sustained by evidence.

1. The evidence sustains a finding of the jury that the defendant, whose auto came into collision with the plaintiff, was negligent, and it was not such as to require a finding that the plaintiff was negligent.

Use of automobile — charge to jury.

2. There was no error in calling the attention of the jury to the dangers attendant upon the use of an automobile, when explaining the care required, and the charge was not to the effect that an auto is a dangerous instrumentality.

Duty of driver to give warning.

3. There was no error in instructing as to the duty of a driver to give warnings, nor in reading a portion of G. S. 1913, § 2632, relative to the duties of a driver when approaching a pedestrian or a street intersection.

Refusal to give requests to jury.

4. There was no error in refusing to give requested instructions upon contributory negligence nor the relative rights of an auto and a pedestrian in a street, both matters being covered by the general charge.

¹Reported in 175 N. W. 545.

Instructions to jury not prejudicial.

5. There was no prejudicial error in instructing the jury that the defendant claimed that the plaintiff walked in front of his auto and was injured, although his claim was that he walked into it.

Verdict not excessive.

6. The verdict is not excessive.

Action in the district court for Goodhue county to recover \$15,000 for personal injuries. The answer alleged that plaintiff carelessly and negligently moved against and collided with defendant's automobile and thereby caused some injury to himself from which he had recovered. The case was tried before Johnson, J., who when plaintiff rested denied defendant's motion to dismiss the action and at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$6,000. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. **Affirmed.**

Mohn & Mohn and *A. J. Rockne*, for appellant.

Samuel A. Anderson and *P. B. Green*, for respondent.

DIBELL, J.

Action for personal injuries. There was a verdict for the plaintiff. The defendant appeals from the order denying its alternative motion for judgment or a new trial.

1. The plaintiff on the night of February 4, 1918, while he was walking home, came into collision with the defendant's auto on one of the streets of Red Wing and was injured. He was walking on the easterly side of West avenue going in a southerly direction, and was approaching an intersection of streets which is called in the evidence the "square." From this square streets radiated in five directions sufficiently accurately stated as north, east, south, southwest and west. West avenue proceeded from this "square" in a southwesterly direction. The defendant was approaching from the southwest along the avenue in his auto. The plaintiff, according to his testimony, saw the auto before he got to the square, continued about half way across the square, going south, then looked again and saw the auto approaching on West avenue slightly southwest-

erly of the westerly side of the square. He then continued on his way and was struck by the fender of the auto before reaching the other side. He heard no signal or warning. When he started across from the middle of the street, the auto, upon his theory, was southwesterly of the square and a safe distance away. It might turn in his direction and go east on the street he was crossing, or it might go north on West avenue. If it went north he was not in its path. The jury could find that he might reasonably believe that there was time to get across though the auto came his way, and that he was not negligent in doing as he did, and it could find that if the defendant had kept a proper lookout and had given a warning and had gone slowly he could have avoided the accident and that he was wanting in care. The night was still and cold and there was nothing in the street to distract the attention of either the plaintiff or the defendant. When an accident occurs under the circumstances disclosed it is the result of an unexplained accident or of the negligence of one or both of the parties, and the questions of negligence and contributory negligence were for the jury.

2. The assignment challenging the charge upon the ground that it was an instruction that an auto is a dangerous instrumentality is predicated upon a wrong construction of it. The court did not so charge. It did, in explaining the amount of care requisite to constitute ordinary care, refer to the fact known to all that the use of an automobile on the streets is attended with dangers, and it stated that commensurate care should be used, and it used the words dangerous instrumentality. It did not state that an auto is a dangerous instrumentality within the rule of law applicable to the care and protection of dangerous instrumentalities. See *Slater v. Advance Thresher Co.* 97 Minn. 305, 314, 107 N. W. 133. There was no question of dangerous instrumentality in the case, as that phrase is understood, nor was such a question presented to the jury.

3. There was no error in calling attention to the duty of warning resting upon the driver of an auto, nor in calling attention to a portion of G. S. 1913, § 2632, upon the duty of the driver of an auto upon approaching a pedestrian or an intersecting highway to give warning. It is true enough that no warning was necessary to inform the plaintiff that an auto was approaching on West avenue, for he saw it, but the giving of a warning after it turned in his direction and when it was crossing the

square might have avoided the accident. The failure to give a warning was a circumstance of some importance, and the court in charging upon it said nothing prejudicial to the defendant.

4. There was no error in refusing to give specific instructions requested upon contributory negligence, nor was there error in refusing to give a specific charge requested upon the relative rights of the plaintiff and the defendant in the street. The general charge covered both matters.

5. The court charged that the defendant claimed that the plaintiff walked in front of his automobile and was injured. This was inaccurate. The defendant claimed that he walked into the automobile. This is not a circumstance of consequence. The jury understood the situation. The left fender hit the plaintiff. There was no prejudice resulting to the defendant from the statement.

6. The verdict was for \$6,000, and it is urged that it is excessive.

The plaintiff was a Lutheran minister with a charge at Red Wing. Before assuming his pastorate he was for many years engaged in denominational educational work. He was 57 years old at the time of the injury. There was a comminuted fracture of the right leg a few inches above the ankle and there were other minor injuries. His suffering was very considerable. The leg is one and a half inches shorter than the other. There is evidence that a fallen arch has resulted from the injury. He used crutches in July, 1918, and soon after commenced using two canes. He was attended by the defendant, who was a leading surgeon of the city, and in charge of the city hospital. The treatment was skilful, there was no considerable infection, and the result was good, but the injury was in its nature a severe one and is permanent in its consequences. The verdict is not excessive as the result of passion or prejudice.

Order affirmed.

STATE v. ANDREW BROTHERS.¹

December 19, 1919.

No. 21,599.

Constitution — delegation of legislative power—statute contingent on an act of Congress.

1. Chapter 455, Laws 1919, is not unconstitutional as a delegation of legislative power to Congress. If an act of the legislature is complete in itself, the legislature may provide that its operation shall be contingent on the existence of an act of Congress of a certain purport.

Same — provisions of act germane to its subject.

2. The statute does not contain more than one subject. There is but one general subject, the prohibition of the liquor traffic. The provisions making places where liquors are manufactured and sold nuisances, and providing for their abatement, are germane to this general subject.

Same — enforcement of War Prohibition Act.

3. The provision that the statute is intended to provide for the enforcement of the War Prohibition Act of Congress does not constitute a separate subject.

Transportation of Liquor forbidden.

4. The statute prohibits the transportation of liquor whether for purposes of sale or otherwise, medicinal and other permitted purposes excepted.

Intoxicating Liquor — how legislature may enforce prohibition.

5. In order to make the enforcement of prohibition effective, the legislature may prohibit traffic in beverages near to intoxicants, though not actually intoxicating. The fact that the legislature declares such beverages intoxicating does not invalidate such prohibition. It is within the power of the legislature to prohibit the manufacture, transportation and sale of liquor containing one-half per cent of alcohol.

Same — act not in conflict with act of Congress.

6. The statute is not in conflict with the act of Congress. That it is broader in its prohibitions does not invalidate it.

¹Reported in 175 N. W. 685.

Defendant was indicted by the grand jury of Hennepin county charged with the crime of unlawfully transporting one gallon of intoxicating liquor in the city of Minneapolis. Defendant demurred to the indictment. The demurrer was overruled, Jelley, J., and at defendant's request ten questions were certified to the supreme court as set out at the beginning of the opinion. Affirmed.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, *William M. Nash*, County Attorney, and *Willis I. Norton*, for plaintiff.

Donald G. Hughes, for defendant.

HALLAM, J.

The indictment charged the defendant with unlawfully transporting one gallon of intoxicating liquor in the city of Minneapolis. Defendant demurred to the indictment. The court overruled the demurrer and certified the following questions to this court:

- (1) Do the facts stated in said indictment constitute a public offense against the laws of the state of Minnesota?
- (2) Is chapter 455 of the laws of Minnesota 1919 constitutional?
- (3) Does the title of said act embrace more than one subject contrary to article 4, section 27, of the Constitution of Minnesota?
- (4) Does the title of said act embrace more than one subject which is not expressed in its title contrary to article 4, section 27, of the Constitution of Minnesota?
- (5) Is section 27 of said act, and particularly the part referring to the act of Congress of November 21st, 1918, commonly known as "War Prohibition," a separate subject not expressed in the title of said act?
- (6) Has the legislature of Minnesota the power under the Constitution of this state to enact said act?
- (7) Under section 27 of said act, did the legislature of Minnesota delegate its police powers away to the Federal government?
- (8) Does the interpretation and enforcement of said act at the present time depend upon the provisions of the act of Federal Congress of November 21st, 1918, commonly known as "War Prohibition," and if so

is said act contrary to said legislation of Congress, and if so contrary is this act of the Minnesota legislature void?

(9) Is the question as to what is intoxicating liquor, as defined under section 1 of said act, a judicial one for the courts, or one for the legislative branch of government, or, in other words, has the legislature the power to define that intoxicating liquors are such if they contain one-half of one per cent or more of alcohol by volume?

(10) Does section 2 of said act only forbid the transportation or keeping of liquor for the purpose of sale or does it forbid the transportation for any purpose?

1. The prosecution is under chapter 455, p. 537, Laws 1919. The claim is made that this statute is unconstitutional as a delegation of the legislative power of the state to the Federal government. This is based on the provision of section 27 that the statute is "intended to provide for the enforcement of * * * the provisions of the act of Congress of November 21, 1918, commonly known as War Prohibition."

The legislature cannot delegate its power to make laws, but, having general power of enacting laws, it may enact them in its own way and give them such effect as it chooses. It may provide that a law shall go into effect at one time or another, absolutely or on condition, and, if the act is complete in itself, it is within the scope of the legislative power to prescribe that it shall become operative only on the happening of some specific contingency. 12 C. J. 864, and cases cited; Sutherland, St. Const. § 71; Blanding v. Burr, 13 Cal. 343, 357.

This principle is well settled in this state. In *State v. Sullivan*, 67 Minn. 379, 69 N. W. 1094, it was held that the taking effect of a statute may be made contingent on a vote of a city council, and that this does not constitute a delegation of legislative power, and that when that event happens the statute takes effect and becomes law, by force of the legislative action, as fully as if the legislature had unconditionally fixed the time when it should take effect. Such a law is not incomplete.

The same principle is settled in the Supreme Court of the United States. In *The Aurora v. United States*, 7 Cranch, 382, 3 L. ed. 378, it was held that the operation of an act of Congress may be made to depend on the contingency of certain action by a foreign government, and

the court could "see no sufficient reason why the legislature should not exercise its discretion in reviving the act * * * either expressly or conditionally, as their judgment should direct." This situation frequently arises in the case of so-called retaliatory statutes. There is nothing in our Constitution which, either expressly or impliedly, forbids the legislature from providing that the operation of a state statute shall be made contingent on the existence of an act of Congress of a certain purport.

2. Defendant contends the act violates article 4, section 27, of our state Constitution, which provides that no law shall embrace more than one subject. The contention is that the title embraces three subjects, the prohibition of the manufacture and sale of liquor, the regulation of the manufacture and sale of liquor, and an attempt to define nuisances and to provide for their abatement.

What the Constitution requires is that a statute shall embrace but one general subject, and that all matters contained in it shall be so related to each other as to be fairly germane to that subject. *Johnson v. Harrison*, 47 Minn. 575, 141 N. W. 526; *State v. Sharp*, 121 Minn. 381, 141 N. W. 526; *State v. People's Ice Co.* 124 Minn. 307, 144 N. W. 962. We can see here but one general subject, the prohibition of the traffic in intoxicating liquors for beverage purposes. The provisions as to nuisances have relation to the enforcement of the prohibition and pertain to the general subject of the act. *City of Wilson v. Herink*, 64 Kan. 607, 68 Pac. 72; see *State v. Scoville*, 197 Ala. 223, 72 South. 546; *State v. Moran*, 46 Wash. 596, 90 Pac. 1044.

3. Defendant contends that the provision of section 27 that the act is intended to provide for the enforcement of war-time prohibition, constitutes a separate subject, which should be expressed in the title to the act. Clearly it does not. This language is merely an expression of one of the purposes to be accomplished by the act.

4. Defendant contends that the statute forbids the transportation of liquor only when transported for purposes of sale, and that, since the indictment does not charge that the transportation was for the purposes of sale, it is faulty. With this construction of the statute we do not agree. The statute forbids the "manufacture, sale, disposition or transportation * * * or the keeping or having in possession, for sale, disposition or transportation." This language is so plain that it is not open to con-

struction. It forbids all manufacture, sale, disposition or transportation, of intoxicating liquors save for medicinal, and other uses, excepted elsewhere in the act, and it forbids the keeping or having in possession for sale, disposition or transportation.

5. The act defines intoxicating liquor as "any distilled, fermented, spirituous, vinous or malt liquor * * * whenever any of said liquors * * * contain one-half of one per cent or more of alcohol by volume." Defendant contends that the determination as to what liquor is intoxicating is a judicial question and not a legislative one and that this provision of the act invades the province of the courts and that it is void.

As said in *State v. Hosmer*, *infra*, page 342, 175 N.W. 683, it is within the police power of the state to prohibit all traffic in intoxicating liquors, including the manufacture, sale, transportation and possession thereof. In order to make the enforcement of these prohibitions effective the state may prohibit traffic in beverages near to intoxicants, even though not intoxicating in themselves. *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. ed. 184; *Claunch v. State* (Tex. Cr. App.) 203 S. W. 891; *State v. Walder*, 83 Oh. St. 68, 93 N. E. 531; *State v. Frederickson*, 101 Me. 37, 63 Atl. 535; *Joyce, Intoxicating Liquors*, § 9; *Woolen and Thornton, Intoxicating Liquors*, § 114; *Marks v. State*, 159 Ala. 71, 48 South. 864, 133 Am. St. 20; *State v. Intoxicating Liquors*, 76 Iowa, 243, 41 N. W. 6, 2 L.R.A. 408; *Commonwealth v. Brelsford*, 161 Mass. 61, 36 N. E. 677. It is not important that the legislature has declared liquor containing one-half per cent alcohol intoxicating. Liquor with such content of alcohol comes within the class of near intoxicants. The state may include it within its prohibition whether intoxicating or not. Whether it will do so or not is a matter of legislative discretion.

6. Defendant contends that the act is controlled by the act of Congress, and if in conflict with the act of Congress it must fail. As held in *State v. Hosmer*, *supra*, though the expressed purpose of the act is to make the War Prohibition Act of Congress more effective, still our statute is a complete and independent act in itself, and is to be construed according to its own terms. Its interpretation and its enforcement are not circumscribed by the provisions of the act of Congress. It may be broader in its prohibitions. This is not a case where Congress has usurped

the whole field. We recently held that the act of Congress for the suppression of the traffic in narcotics might be supplemented by state legislation and that the state legislation might be more rigorous in its terms than the Federal act. *State v. Whipple*, 143 Minn. 403, 173 N. W. 801. The same principle applied here. If our statutes were in conflict with the act of Congress a different question would be presented, but we are of the opinion that there is no conflict between them.

Some of the questions certified are discussed in *State v. Hosmer*, *supra*, and they need not be further discussed here.

The first, second and sixth questions are answered yes.

The third, fourth, fifth and seventh are answered no. The other questions are answered as follows:

8. Our statute is an independent act, not in conflict with the act of Congress, and not circumscribed in its construction by the provisions of the act of Congress. It is not void.

9. The legislature has power to prohibit traffic in liquor containing one-half per cent alcohol, whether the proof shows that it is intoxicating or not.

10. Our statute prohibits transportation of intoxicating liquors for any purpose, medicinal and other permissive uses excepted.

Order affirmed. .

STATE v. EUGENE A. HOSMER.¹

December 19, 1919.

No. 21,600.

Enforcement of War Prohibition Act — state statute.

1. Chapter 455, Laws of 1919, expresses a purpose to provide for the enforcement of the act of Congress, commonly known as War Prohibition. This does not limit the operation of the statute to the matters prohibited by the act of Congress, if, by its terms, it is broader than the act of Congress. The state statute is a separate, complete and independent act.

¹Reported in 175 N. W. 683.

Intoxicating liquor — exercise of police power.

2. A state statute, absolutely prohibiting, within the limits of the state, the manufacture and sale of intoxicating liquors, is a warranted exercise of the police power of the state. It is not in contravention of our state Constitution or of the Constitution of the United States.

Same — accomplishment of end in view.

3. The ultimate purpose of prohibition is to prevent the excessive use of intoxicating liquors. To accomplish that purpose, and to prevent evasions, the legislature may prohibit the traffic, the sale, the transportation, the possession and the manufacture, even for the use of the manufacturer.

Indictment — use as beverage.

4. It is not necessary, in an indictment under our statute, to allege that the liquor was potable as a beverage.

Intoxicating liquor—prohibitions of statute.

5. The prohibitions of our statute are not limited to liquors manufactured from grains, cereals, fruit, or other food products.

Same — manufacture for private use forbidden.

6. The statute forbids the manufacture of intoxicating liquor for the private use of the manufacturer.

Defendant was indicted by the grand jury of Hennepin county charged with the crime of manufacturing one quart of intoxicating liquor commonly called beer to be used as a beverage and containing one-half of one per cent or more of alcohol. Defendant demurred to the indictment. The demurrer was overruled, Jelley, J., and at defendant's request the questions set out at the beginning of the opinion were certified to the supreme court. Affirmed.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, *William M. Nash*, County Attorney, and *Willis I. Norton*, for plaintiff.

Benjamin Davenport, for defendant.

HALLAM, J.

The indictment charges that in Minneapolis, Minnesota, defendant manufactured one quart of beer to be used as a beverage and containing one-half of one per cent of alcohol. Defendant demurred to the indict-

ment. The court overruled the demurrer and certified the following questions to this court:

- (1) Does the indictment state facts showing a public offense?
- (2) Should it not state that the liquor was made from grain or cereals, or fruits or other foods as provided by an act of Congress?
- (3) Does the indictment state an offense under chapter 455, Session Laws 1919, without regard to that portion of section 27, referring to the amendment of the United States Constitution and the act of Congress?
- (4) Do the first four lines of section 27 affect the remainder of said chapter as to its scope, validity or invalidity?
- (5) Does the intention of the chapter as expressed in section 27 affect the whole chapter and stamp itself on every clause thereof?
Are these first four lines valid law?
- (6) Is not their importance, if valid, so great that the substance thereof should be indicated in the title of the act, and not being indicated, is not the entire act subject to the objection that the subject matter is not expressed in the title?
- (7) Does the expressed intention of the act, to enforce the provisions of the act of Congress, make those provisions the entire basis of this indictment?
- (8) Does the definition of intoxicating liquor, as stated in section 1, bind the judgment of the judge and jury, where it appears that the liquid contains one-half of one per cent of alcohol, and is intended to be used as a beverage, and is the defendant precluded from rebutting the fact, if untrue in fact, by proving that in fact the liquor is not intoxicating?
- (9) Does this chapter prevent the making of intoxicating liquor, where the person so making it in good faith intends it to be used as a tonic for himself or family, and not for other use, and he using his own judgment as to his need of it as such tonic, and without any physician's advice?
- (10) Is the keeping of intoxicating liquor for one's own use, but not for sale or other disposition, unlawful as applied to the general public; and, if not unlawful, would it be unlawful for him to make other

liquor of the same kind to replace that consumed by him, all being for his own use and not for sale or other disposition?

1. The prosecution is under chapter 455, p. 537, Laws of 1919. Section 27 of the statute contains this language: "This act is intended to provide for the enforcement of * * * the provisions of the act of Congress of November 21, 1918, commonly known as War Prohibition." This expression of the motive or purpose of the legislature in passing the statute is of little importance save as it may, in a doubtful case, aid in construction. It does not restrict the plain language of the statute. It does not limit the operation of the statute to the matters prohibited by the act of Congress, if by its terms it is broader than the act of Congress. It is the expression of a purpose to make more effective the prohibition imposed by the act of Congress,¹ but the state statute is, notwithstanding, a separate, complete and independent act.

2. A state statute, absolutely prohibiting, within the limits of the state, the manufacture and sale of intoxicating liquor as a beverage, is a warranted exercise of the police power of the state. 23 Cyc. 77, and cases cited. Such a statute is not in contravention of any provision of our Constitution. This is well established in states having constitutions similar to our own. *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487; *People v. Hawley*, 3 Mich. 330; *Lincoln v. Smith*, 27 Vt. 328, 362; *Menken v. City of Atlanta*, 78 Ga. 668, 2 S. E. 559; *Kettering v. City of Jacksonville*, 50 Ill. 39. Nor is it in contravention of the Constitution of the United States. *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. 8, 97, 28 L. ed. 629; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. ed. 346.

3. The ultimate purpose of prohibition is to prevent the excessive use of intoxicating liquor with the incidental evil results therefrom. See *State of West Virginia v. Adams Express Co.* 219 Fed. 794, 135 C. C. A. 464, L.R.A. 1916C, 291; *Marks v. State*, 159 Ala. 71, 48 South. 864, 133 Am. St. 20; *State v. Phillips*, 109 Miss. 22, 67 South. 651,

¹[40 St. 1046.]

L.R.A. 1915D, 530. The state may adopt such measures as are reasonably appropriate to accomplish that end, and, to make the prohibition effective, and to prevent evasions, the legislature may prohibit the traffic, *State v. Conlin*, 27 Vt. 318; the sale, *State v. Bass* Pub. Co. 104 Me. 288, 71 Atl. 894, 20 L.R.A.(N.S.) 495; the transportation, *Kizer v. State*, 140 Tenn. 582, 205 S. W. 423; the possession, *Crane v. Campbell*, 245 U. S. 304, 38 Sup. Ct. 98, 62 L. ed. 304; *State v. Macek*, 104 Kan. 742, 180 Pac. 985; and the manufacture, even for the use of the manufacturer, *State v. Marastoni*, 85 Ore. 37, 165 Pac. 1177; *State v. Fabbri*, 98 Wash. 207, 167 Pac. 133, L.R.A. 1918A, 416. See also *Woolen & Thornton, Intoxicating Liquors*, § 114.

4. The statute defines intoxicating liquor to mean "any distilled, fermented, spirituous, vinous or malt liquor * * * of any kind potable as a beverage." Defendant contends that the indictment is insufficient in that it does not charge that the liquor was "potable as a beverage." It does allege that the liquor was manufactured to be used as a beverage. That liquor manufactured to be used as a beverage is potable, that is, drinkable, is necessarily implied.

5. Defendant refers to section 1, subd. 4 of the act of Congress¹ which provides that "no grains, cereals, fruit or other food products, shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes," and insists that, since our statute is in aid of the enforcement of the act of Congress, it should be construed as prohibiting only the manufacture of liquor from the products above mentioned. The above language is not the only prohibitory language of the act of Congress. The same section also prohibits the sale of beer, wine or other intoxicating malt or vinous liquor for beverage purposes. But this is not important. As above stated the prohibitions of our own statute are to be found in the statute itself and not elsewhere. They are not limited by the act of Congress.

6. Defendant contends that this statute does not forbid the manufacture of intoxicating liquor, except when manufactured for purpose of transportation or sale, and that, since the indictment does not allege either, it is insufficient. We do not agree with this construction of the statute. The statute makes unlawful the "manufacture, sale, disposition or transportation * * * or the keeping or having in possession for

¹[40 St. 1046.]

sale, disposition or transportation," save for such medicinal or other purposes as are elsewhere excepted from the prohibition of the statute. It prohibits manufacture for the private use of the manufacturer as well as for sale. No other construction seems to us possible. Defendant contends the words "for sale" appearing after the word "possession" qualifies each one of the preceding words, namely, manufacture, sale, disposition, transportation and keeping or having in possession. To our minds this is not a possible construction of the language. The words "for sale, disposition or transportation" in the latter part of the sentence were intended to qualify only the words, "the keeping or having in possession." To hold that these words or either of them qualify the same words as used in the earlier part of the sentence would result in manifest absurdity. Neither do any of them qualify the word "manufacture."

Some of the questions certified are discussed in *State v. Brothers*, supra, page 337, 175 N. W. 685, and the discussion is not repeated here.

The first, third and ninth questions are answered yes.

The second, sixth and seventh are answered no.

The other questions are answered as follows:

Fourth. The words of section 27 mentioned do not limit the remainder of the statute nor affect its validity.

Fifth. The words of section 27 mentioned are to be taken into account in construing the law. They do not invalidate it.

Eighth. Same as answer to question number 9 certified in *State v. Brothers*.

Tenth. All manufacture of intoxicating liquor to be used as a beverage is forbidden. Possession for sale, disposition or transportation is forbidden.

Order affirmed.

STATE v. JOHN T. SMITH AND OTHERS.
CY LYONS, APPELLANT.¹

December 24, 1919.

No. 21,534.

Criminal law — deposit of fraudulent ballots.

1. Defendant was indicted with others, for the crime of putting fraudulent ballots into the ballot box at a city election. The state's claim was that according to a general plan or conspiracy in which defendant participated, the names of fictitious persons were registered, that on the night before election defendant and others marked a number of fictitious ballots, and that defendant deposited the ballots in the box on election day. Defendant was convicted.

Same — conviction sustained by evidence.

2. The evidence of defendant's participation in the crime was sufficient to sustain his conviction.

Accomplice — question for jury.

3. The court properly submitted to the jury the question whether Hammett, one of the election clerks, was an accomplice. That Hammett was guilty of the distinct crime of entering fictitious names on the poll book does not make him an accomplice in the crime of which defendant was convicted. The test as to whether a witness is an accomplice is, could he have been indicted and punished for the offense of which defendant is charged? One connected with the crime as an accessory after the fact is not an accomplice.

Corroboration of testimony of accomplices.

4. The testimony of Hammett affords sufficient corroboration of the testimony of the accomplices. His testimony that he thought defendant was one of the participants he saw in the election booth was corroborative evidence of identification. It is not necessary that the corroborative evidence should be sufficient, standing alone, to warrant a conviction. It is only necessary that it shall tend in some degree to prove that defendant committed the crime.

Refusal to charge jury.

5. It was not error to refuse to instruct the jury that if defendant

¹Reported in 175 N. W. 689.

was not actually in the polling booth on election day they must acquit. It was not necessary that the accomplice be corroborated on every point.

Same.

6. It was not error to refuse to instruct the jury that if they found Hammett was an accomplice then there was no sufficient corroboration of the accomplice.

Evidence.

7. It was not error to receive evidence of fraudulent registration on registration days as part of the conspiracy in which defendant participated although defendant was not present at the time of registration.

Defendant was indicted by the grand jury of Ramsey county charged with the crime of fraudulently putting ballots into a ballot box at an election in the city of St. Paul, tried in the district court for that county before Michael, J., and a jury which found him guilty as charged in the indictment. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Thomas J. Newman and Thomas R. Kane, for appellant.

Clifford L. Hilton, Attorney General, James E. Markham, Assistant Attorney General, Richard D. O'Brien, County Attorney, and Harry H. Peterson, Assistant County Attorney, for respondent.

HALLAM, J.

1. Defendant was indicted with several others, charged with the crime of fraudulently putting 190 ballots into the ballot box of the first election district of the Third ward, of the city of St. Paul, at the city election, held May 7, 1918. It stands admitted that the crime was committed by some persons. It also stands admitted that the crime had been planned for some time prior to the election, and that the ground work was in part laid at the registration preceding the election. The method employed was to register the names of a large number of fictitious persons, then to mark the requisite number of ballots with crosses opposite names of the candidates to be benefited, and then to put the ballots into the box on election day. The plan was a simple one and dispensed with the cumbersome and expensive machinery incident to the use of repeaters, yet it

required the co-operation, or acquiescence, or at least the inaction, of the judges and clerks of election. John T. Smith, who was neither a judge nor a clerk, was apparently the lieutenant in charge. Smith was indicted, but not arrested. Some of the judges of election were active participants in the crime. Defendant was neither a judge nor a clerk of election, nor is there any evidence of his participation in this crime until the evening before the election. The claim of the state is that on the evening before election defendant met with Smith, P. J. Costello and Scofield, one of the election judges, in a room in a down town hotel, and there marked the spurious ballots that were to be used the next day, that defendant took the ballots and deposited them in the ballot box early in the morning of election day. The jury found defendant guilty and he appeals.

2. Defendant contends that the evidence is not sufficient to sustain the verdict. There is not for the fact that some of the witnesses were accomplices and others claimed to be such, there would be little question that the evidence is sufficient.

Piemeisl, one of the election judges, and keeper of the hotel mentioned, testified positively that at about eight o'clock in the evening of the sixth, Costello and defendant came to his hotel, that they joined Scofield who was already there, took the ballots to a private room, locked the door from the inside, and remained there about two hours.

Scofield testified that he was in this room with Smith, Costello and "a fellow by the name of Lyons," who looked like defendant; that Costello and Lyons marked the ballots, witness initialed them and handed them to Smith, Smith folded them and handed them to "this fellow here," meaning Lyons; that Lyons put them in his pocket; that early on the morning of election day the same men he met in the room the evening before came to the voting booth, and that "Lyons" put the spurious ballots into the box.

Reavey, another election judge, testified that defendant came into the booth with Costello. Reavey did not see the ballots put into the box, but, while defendant and Costello were there, he saw that there were a large number of ballots in the box and that they "couldn't have been" deposited by legal voters.

Hammett, a clerk of election, testified that he thought he saw defendant in the booth on election day, that he thought defendant came in with

Costello and went into a back room with Costello and Smith. Asked again to give his best recollection as to whether defendant was the same man he saw with Costello and Smith, he said: "I think so but I don't want to be positive."

Dumford, a worker for some of the candidates not benefited by the fraud, called at the booth at about 8 p. m. with some friends to look after the interests of his candidate. He had trouble getting in and was told by those inside he must not be around the booth. While they were standing outside, defendant came along, asked what he was doing there and who sent him. When Dumford told him he was there to watch the count and that the labor candidates had sent him down, defendant said that was all right and walked away.

Against this evidence of the state, defendant offered his own denial. He denied that he even knew Scofield, Piemeisl, Hammett or Smith. In proof of an alibi he offered testimony that he was in Winnipeg on May 6 and 7. The proof of alibi seemed to have some persuasive force, until it was made to appear that he had testified under oath on a former occasion that he was in St. Paul on election day, May 7. His only explanation of his former testimony was that he was confused and meant primary election day, but this explanation fell to the ground when, almost immediately, he admitted that he was not in the city on primary election day.

The evidence was quite sufficient to identify defendant as one of the perpetrators of this crime and to sustain a verdict of guilty.

3. The court instructed the jury that, if the offense charged in the indictment was committed, then Scofield, Reavey and Piemeisl were all accomplices, and that defendant could not be convicted on the testimony of these witnesses, unless they were corroborated by other evidence. The court then submitted to the jury the question whether Hammett was an accomplice. Defendant contends that the court should have instructed the jury as a matter of law that Hammett was by his own admissions an accomplice. With this contention we do not agree.

The rule that a person shall not be convicted of a crime on the uncorroborated testimony of an accomplice is a statutory rule. G. S. 1913, § 8463.

At common law the judges might advise the jury not to return a verdict of guilty on the uncorroborated testimony of an accomplice, but they were not required to give this advice. 2 Bishop, *Crim. Proc.* § 1169; *Commonwealth v. Wilson*, 152 Mass. 12, 25 N. E. 16; *Pollock v. Pollock*, 71 N. Y. 137; *Black v. State*, 59 Wis. 471, 18 N. W. 457.

It was stated in the argument in this court that Hammett pleaded guilty to the crime of attempting to unlawfully enter false and fraudulent names on the poll books. This is a distinct crime under G. S. 1913, § 610, and is not the same crime as that for which defendant was convicted, namely, fraudulently putting ballots in the ballot box as prohibited by section 611. The fact that Hammett committed another distinct crime does not make him an accomplice in the commission of this one. In order that he may be an accomplice he must have been concerned with the same crime. The evidence of Hammett's connection with the offense of which defendant was convicted is substantially as follows: He was called to act as clerk of election on election morning. He had no connection with the election frauds before that time. When he arrived at the booth, Scofield, Piemeisl and Smith were already there. Reavey was there or came soon after. Hammett was given one of the poll books in which the law required him to enter the names of electors regularly voting. Smith called off names from a list, and Hammett entered them in the poll book. There is no evidence that he saw defendant deposit the ballots for city officers in the box. He then gave the testimony above mentioned, as to defendant's presence in the booth, and as to Costello and Smith and defendant going into the back room together. He testified that Smith took a pad of ballots with him, and when they came out Smith deposited ballots in a box. It is claimed by the state that these were not the ballots marked the night before, but ballots on a charter amendment. Later Smith read off other names, and Hammett entered them in the poll book. When the polls were closed he assisted in counting the ballots and signed the return.

The test as to whether a witness is an accomplice, is: Could he have been indicted and punished for the offense of which defendant is charged? 16 C. J. 671, and cases cited; *State v. Durnam*, 73 Minn. 150, 165, 75 N. W. 1127; *State v. Gordon*, 105 Minn. 217, 117 N. W. 483, 15 Ann.

Cas. 897. In the above cases, the test was said to be whether he could be indicted for the offense "as principal or accessory."

4. The trial judge in his charge followed this language. In *State v. Price*, 135 Minn. 159, 160 N. W. 677, the court said:

"To make a witness an accomplice, it seems logical that it should appear that a crime has been committed, that the person on trial committed the crime, either as principal or accessory, and that the witness co-operated with, aided or assisted the person on trial in the commission of that crime either as principal or accessory."

At common law there was a well-defined distinction between an accessory before the fact and an accessory after the fact, the former being one who aided or abetted the principal offender before or at the time of the commission of the crime, and the latter one who aided the principal to escape after the crime was committed. In none of the cases above cited was it stated whether, by use of the word "accessory," was meant accessory before the fact or accessory after the fact, or both. Strictly speaking there is no such thing now as an accessory before the fact, for an accessory before the fact is, by our statute, made a principal, G. S. 1913, § 8478, while an accessory is by statute defined as:

"Every person not standing in the relation of husband or wife, parent or child, to the offender, who, after commission of a felony, shall harbor, conceal, or aid such offender, with intent that he may avoid or escape from arrest, trial, conviction or punishment, having knowledge or reasonable ground to believe that such an offender has committed a felony or is liable to arrest, is an accessory to the felony."

In none of the cases above cited was there any occasion to determine whether an accessory after the fact was an accomplice. The language above quoted from the *Price* case makes it clear that the court did not have in mind an accessory after the fact, for it defines as one of the essentials of an accomplice "that the witness co-operated with, aided or assisted the person on trial in the commission of that crime." Such a witness could only be an accessory before the fact, or, under our statute, a principal. We do not feel therefore that the question whether an accessory after the fact is an accomplice has been foreclosed by the decisions cited.

The great weight of authority elsewhere is that an accessory after the

fact is not an accomplice. 16 C. J. 675; *State v. Jones*, 115 Iowa, 113, 88 N. W. 196; *Walker v. State*, 118 Ga. 757, 45 N. E. 608; *State v. Umbel*, 115 Mo. 452, 22 S. W. 378; *Levering v. Commonwealth*, 132 Ky. 666, 117 S. W. 253, 136 Am. St. 192, 19 Ann. Cas. 140; *People v. Rick-er*, 51 Hun, 643, 4 N. Y. Supp. 70, affirmed 115 N. Y. 668; *State v. Riddell*, 38 R. I. 506, 96 Atl. 531; *State v. Phillips*, 18 S. D. 1, 98 N. W. 171, 5 Ann. Cas. 760. We are of the opinion that this is the most satisfactory rule and we adopt it.

The reasons for requiring the testimony of an accomplice to be bolstered up by corroborating testimony are, that it is the testimony of one admittedly corrupt, and that it is likely to have been given in the hope that, by turning state's evidence, the witness may receive clemency. 2 Bishop, *Crim. Proc.* § 1169; *United States v. Van Leuven* (D. C.) 65 Fed. 78. These reasons do not apply with the same force to the testimony of an accessory after the fact as to a participant in the crime.

The question whether a witness is an accomplice or not is usually a question for the jury. *State v. Lawlor*, 28 Minn. 216, 9 N. W. 698. We think the question whether Hammett was an accomplice was properly submitted to the jury. He was not, as a matter of law, a principal in the crime charged against the defendant.

5. The testimony of Hammett affords ample corroboration of the testimony of the witnesses who were accomplices. His testimony that he thought defendant was the man he saw in the booth constitutes corroborative evidence of identification. *Commonwealth v. Cunningham*, 104 Mass. 545; *State v. Franke*, 159 Mo. 535, 60 S. W. 1053. It is not necessary that the corroborative evidence should be sufficient, standing alone, to warrant a conviction. It is only necessary that it shall tend in some degree to prove that the defendant committed the crime. If the testimony of the accomplices and the corroborating testimony together establish the guilt of defendant beyond a reasonable doubt, a verdict of guilty is sustained. *State v. Lawlor*, 28 Minn. 216, 9 N. W. 698. The evidence is sufficient to sustain the verdict.

6. Defendant contends that the court should have instructed the jury that "unless it found that the defendant was actually present in the polling booth on the 7th day of May and aided, assisted and abetted in some manner in the placing of the fictitious ballots in the ballot box, then

the defendant should be acquitted." The failure to give such instruction was not error. The jury might find defendant guilty, even though he did not actually participate in placing the fictitious ballots in the box, if the events of the night before occurred as narrated. It was not necessary that the accomplices be corroborated on every point. If corroboration on any point tends to prove defendant's participation in the crime, then all of the testimony of the accomplices may be taken into account. The proposed instruction singled out and gave undue emphasis to particular defenses, a practice not to be commended, 16 C. J. 1036; *State v. Meyers*, 132 Minn. 4, 155 N. W. 766, and in effect directed or suggested a finding on particular facts, a practice the court is not required to follow.

Defendant contends that the court should have instructed the jury that, if it found that Hammett was an accomplice, then there was not sufficient corroborative evidence in the case to warrant a conviction. Failure to give this instruction was not error for several reasons: First, the court was not asked to do so; second, such an instruction would have been subject to the same general objection as the proposed instruction last above discussed; and third, there was in fact other corroborative evidence. There was other evidence that defendant registered and voted in contradiction of his own testimony. There was other evidence that he was about the polling booth, manifesting an interest in those who wanted to get in as watchers, and whose admission was for a time denied by his alleged conspirators on the inside, and there was evidence from which the jury might find, and did undoubtedly find, that he had interposed a false alibi. We think these items of evidence alone constituted corroboration sufficient to take the case to the jury. 16 C. J. 707, § 1445; *People v. McLean*, 84 Cal. 480, 24 Pac. 32 (contradictory statement by defendant as to his whereabouts at time of crime); *Fort v. State*, 52 Ark. 180, 11 S. W. 959, 20 Am. St. 163 (false alibi); *State v. Clements*, 82 Minn. 434, 85 N. W. 229 (book entries made by accomplice); *Simond v. State*, 127 Md. 29, 95 Atl. 1073 (registration book in fraudulent registration case).

Defendant contends that the court erred in receiving the testimony of Scofield, Piemeisl and Reavey as to what was said and done by members of election board on registration days in absence of defendant. No par-

ticular testimony is referred to in connection with this assignment of error. The evidence tends to prove that these witnesses, together with defendant, associated and conspired for the purpose of putting fraudulent ballots in the ballot box, and that their plan was carried out. In carrying out this plan fictitious names were registered on the registration days. When the evidence shows a conspiracy, evidence of transactions between part of the conspirators in furtherance of the common design and object of the conspiracy is admissible against all. *State v. Cline*, 27 S. D. 573, 132 N. W. 160; *State v. Evans*, 88 Minn. 262, 92 N. W. 976; *State v. Dunn*, 140 Minn. 308, 168 N. W. 2.

Order affirmed.

INTERNATIONAL LUMBER COMPANY v. EDWIN G. STAUDE
AND OTHERS.¹

December 26, 1919.

Nos. 21,351, 21,358.

Timber deed — contingent reversion in grantor.

1. One of the provisions of a timber deed was that the grantee should cut and remove the timber within 15 years from the date of the deed, and that during that time, and so long as the timber was not cut, he should have the exclusive right to occupy the lands on which the timber was located and should pay all taxes which fell due prior to the cutting of the timber. *Held* that the grantor in such deed had a contingent reversionary interest in the timber, which he might convey or reserve to himself in a deed of the land subsequently executed.

Deed — construction of ambiguity in favor of grantee.

2. The words of a deed are to be taken as the grantor's and any ambiguity is to be resolved in favor of the grantee. A reservation in favor of the grantor is to be construed more strictly than a grant.

Same — property rights not in minds of parties.

3. The effect of a deed cannot be restricted because rights or property properly embraced in its language were not in the minds of the parties when the sale was agreed upon.

¹Reported in 175 N. W. 909.

Same — construction of reservation.

4. The language of a reservation in a deed may properly be referred to the land described therein, or to the interest or estate in the land, or to both, according to the intention of the parties.

Timber deed — same.

5. A deed of timber lands, part of which were covered by outstanding timber deeds, contained a clause granting the land subject to the provisions of the timber deeds, and another clause reserving to the grantor the timber on all the land described in his deed. *Held* that the reservation clause should be construed to apply only to timber which had not already been sold and conveyed.

Action in the district court for Koochiching county to determine adverse claims to certain timber. The case was tried before McClenahan, J., who made findings and ordered judgment in favor of defendants. From an order denying its motion for a new trial, plaintiff appealed. From an order denying their motion for a new trial, defendants Frank P. Sheldon and Claribel S. Sheldon appealed. Affirmed.

Thomas L. Philips, Charles J. Tryon, Roy C. Smelker, and John Junell, for appellants.

Fryberger, Fulton & Spear filed a brief as amici curiae.

O'Brien, Young, Stone & Horn, for respondents.

LEES, C.

Appeal from orders denying a new trial in an action brought to determine adverse claims to timber in Koochiching county, Minnesota.

The controversy in this action is over the construction of a deed executed by Sheldon and his wife to the Felthous Land Company, May 5, 1904. The material portions of the deed are as follows:

The grant is made "subject * * * to the incumbrances, limitations and reservations hereinafter specified."

Following the description is a clause reading as follows: "It is understood that the timber upon a large portion of said lands has been sold by parties * * * who have given warranty timber deeds therefor, with various periods, usually twenty years, for the removal of such timber,

and said lands are conveyed subject to the provisions of such * * * deeds. * * * The parties of the first part reserve the right to remove at any time from the date of this deed any and all * * * timber from all the lands above described * * * provided, that if the parties of the first part * * * shall fail to pay taxes * * * upon any tract of land above described * * * and * * * have received notice * * * of such delinquency, then sixty days after having received such notice, the right of the first parties to cut and remove such timber shall terminate as to any and all tracts upon which the parties of the first part * * * have so failed to pay the taxes. * * * In case the title shall fail to any portion of the lands * * * a deduction of two dollars per acre shall be made from the purchase price for the portion to which title shall fail * * *."

The timber on 800 acres of the land had theretofore been conveyed. The price paid was between \$9 and \$10 per acre. The timber deeds were executed in 1900 and provided that the timber should be removed within 15 years, and that the owner of the timber should have the exclusive right to occupy the land. He was required to pay all taxes which became payable prior to the cutting of the timber. The defendants Staude, Heitmann and Smith are grantees of the Felthous Company. They paid approximately \$3.33 per acre for the land and purchased subject to existing timber deeds and reservations. Plaintiff acquired title to the timber in 1906. In 1914 Sheldon extended the time within which plaintiff might remove the timber to May 31, 1925. Staude, Heitmann and Smith were the original defendants. Sheldon and his wife were subsequently joined as defendants. The facts were agreed upon and embodied in a stipulation. The findings were adverse to plaintiff's claim. The court below held that Sheldon had conveyed to the Felthous Company his reversionary interest in the timber. Whether he conveyed it or reserved it is the vital question in the case.

The circumstances existing when the deed was executed compel the conclusion that the parties did not have in mind the possibility that plaintiff might not remove the timber prior to the summer of 1915. On part of the land conveyed there was timber owned by plaintiff and others, and on the remainder there was timber owned by Sheldon. It was contemplated that the several owners of the timber would remove it. Sheldon

did not intend to sell any timber to the Felthous Company, which had theretofore been sold to others, and the purchase price paid. He assumed he had no further interest in it. Moreover, if he had so intended, it is manifest that the purchase price would have been more than two dollars per acre, which was the consideration for the deed, for the timber alone had been sold in 1900 for more than nine dollars per acre. The provision that two dollars per acre should be refunded in case the title to any of the land failed, shows that the parties to the deed did not intend to include the timber. A situation has arisen which was not within the contemplation of either party to the deed when it was executed. The words of a deed are to be taken as the grantor's and any ambiguity is to be resolved in favor of the grantee, and a reservation in favor of the grantor is to be construed more strictly than a grant. *Witt v. St. Paul & N. P. Ry. Co.* 38 Minn. 122, 35 N. W. 862; *St. Anthony Falls W. P. Co. v. City of Minneapolis*, 41 Minn. 270, 275, 43 N. W. 56; *Grafton v. Moir*, 130 N. Y. 465, 29 N. E. 974, 27 Am. St. 533; *Elsea v. Adkins*, 164 Ind. 580, 74 N. E. 242, 108 Am. St. 320; 2 Devlin, Deeds, pp. 1560, 1562, 1564, 1832. The contingency that the timber might not be removed within 15 years, does not appear to have been contemplated by the parties to the timber deeds. Evidently they believed that it would be removed within the time allowed and did not intend that the grantees should have any right to it thereafter. It was natural to expect that the purchaser of the timber would protect his investment by taking his property in time. But the effect of a deed cannot be restricted because rights or property properly embraced in its language were not in the minds of the parties when the sale was agreed upon. 2 Devlin, Deeds, p. 1564. The words "from all the lands above described" in the Sheldon deed may properly be referred to the land itself or to the interest or estate in the land conveyed, or to both, according to the intention of the parties. *Derby v. Hall*, 2 Gray, 236; *Kiser v. McLean*, 67 W. Va. 294, 67 S. E. 725, 140 Am. St. 948. We think these words carried with them, when applied to the lands covered by the timber deeds, recognition of the fact that the timber had already been disposed of and would be removed by third persons and that nothing remained to which the reservation could attach. The words "at any time from the date of this deed" strengthen this interpretation. They indicate that Sheldon might begin to exercise

his right under the reservation immediately. This he could do only as to lands not covered by outstanding timber deeds. As to lands covered by such deeds, if the grantees of the timber paid the taxes, he could not exercise this right until after the expiration of the time within which the timber might be removed. It is evident that Sheldon's obligation to pay taxes on the land went with his right to cut the timber. The obligation arose when the deed was executed, but manifestly it was not intended that he should pay any taxes during the period allowed to third persons to cut timber, because such persons had already covenanted that they would pay them. If only lands covered by outstanding timber deeds had been conveyed by Sheldon, a reservation in the form employed would hardly have been used, but, if none of the lands conveyed had been covered by such deeds, the language of the reservation would naturally be used. Sheldon was unfortunate in his choice of words to express his purpose, because he attempted in one deed to convey two different classes of land, which more properly should have been conveyed by separate deeds. But the timber in question, being a part of the realty and not being included in the reservation in the Felthous deed, necessarily and as a matter of law passed to the fee owner on the default of the holder of the timber deed to cut and remove it precisely as all other rights and interests forming part of the land pass to the holder of the fee.

We conclude that the learned trial court placed the proper construction upon the Sheldon deed, and that the order denying a new trial should be affirmed.

Order affirmed.

HALLAM, J. (dissenting).

I dissent:

My opinion is that when Sheldon in his deed to the Felthous Company reserved "the right to remove * * * any and all * * * timber from all the lands" conveyed, he intended just what he said. The fact that he had previously made a conditional sale of the timber growing on part of the land did not defeat the reservation. If the conditions in such timber deeds should fail and the timber revert, it would become Sheldon's timber to dispose of within the time limited in his deed as he

saw fit. Instead of insisting on the forfeiture he might waive it as he did in this case.

OLE ROSENDAHL AND ANOTHER v. MUDBADEN SULPHUR
SPRINGS COMPANY AND ANOTHER.

THE MINNESOTA LOAN & TRUST COMPANY, APPELLANT.¹

December 26, 1919.

No. 21,561.

Vendor and purchaser—purchase money lien—subsequent mortgage.

The plaintiffs gave a contract of sale of certain lands and the grantees assigned to the defendant Mudbaden company. The contract provided that when the purchase price was reduced by payments to \$18,000, a deed should be executed by the grantors, and notes for \$18,000 should be given by the grantees, and that the grantees until the payment of the purchase price should suffer no lien to attach, should pay all taxes, and should keep up insurance the proceeds of which, in case of loss, should be used in rebuilding or should be paid to the grantors. The plaintiffs gave a deed to the Mudbaden company, pursuant to this contract, which recited that it was subject to all its terms and conditions, the company gave its notes, and afterwards mortgaged to the defendant trust company. It is *held* that the contract reserved a lien for the purchase price which survived the giving of the deed and which is superior to the mortgage to the trust company.

Action in the district court for Scott county to establish a lien against certain premises prior to the mortgage of defendant trust company, to recover possession of the premises and \$4,000 damages. The case was tried before Tift, J., who made findings, and ordered judgment in favor of plaintiffs for \$14,416.67. From an order denying its motion for a new trial, the Minnesota Loan & Trust Company appealed. Affirmed.

C. J. Williams and Cohen, Atwater & Shaw, for appellant.

O. A. Brecke and Wilbur H. Cherry, for respondents.

DIBELL, J.

On March 1, 1911, the plaintiffs entered into a contract to convey cer-

¹Reported in 175 N. W. 609.

tain lands to Thenus M. Larsen and Olaf Rosendahl for the sum of \$30,000. It provided that when the purchase price was reduced by payments to \$18,000 the grantors would give a warranty deed, and the grantees would give notes aggregating \$18,000, each for \$83.33, one due each month. The grantees covenanted that until the full amount of the purchase price was paid they would not permit or give a lien upon the premises; that they would pay all taxes; that they would keep the buildings insured, and that in case of loss the proceeds of the insurance would be applied to rebuilding or would be paid to the grantors up to the amount then unpaid on the purchase price. There was a provision to the effect that if there should be a default there should be a forfeiture. Afterwards the grantees assigned the contract to the defendant Mudbaden company. On June 14, 1915, the plaintiff conveyed to the Mudbaden company as assignee of Larsen and Rosendahl, and the company gave its notes amounting to \$18,000. The deed contained this provision:

"This deed is executed pursuant to that certain contract of sale of said premises executed by the first parties to Thenus M. Larsen and Olaf Rosendahl, dated March 1, 1911, which contract has been assigned to the second party hereto, and the conveyance hereby made is subject to all the terms and conditions of said contract."

Afterwards the Mudbaden company made a mortgage for \$100,000 to the defendant Minnesota Loan & Trust Company.

The court found the amount due the plaintiffs upon the contract and adjudged it a lien upon the premises prior to the lien of the trust company mortgage. The correctness of this holding is all that is involved.

The contract intended that the grantees should have a deed when the purchase price was reduced by payments to \$18,000 and that notes should be then executed for such amount. It did not intend that a purchase money mortgage should be executed. It did intend that the grantors should have a lien until the \$18,000 was paid. When the Mudbaden company took its deed it was not in discharge of the contract of March 1, 1911, for the recital was that it was made "subject to all the terms and conditions of said contract." One of the terms and conditions was that no lien should be given until the purchase price was paid and this meant until the \$18,000 evidenced by notes was paid. That it was the intention of both parties that the unpaid purchase price should be a lien is not open to seri-

ous question. The lien was to continue after the deed and until full payment. The deed was not accepted in full performance of the contract, for it was made subject to its provisions, and the case is not within Hubachek v. Brown, 126 Minn. 359, 148 N. W. 121, and other cases cited therein. The trust company took under the deed and is not in a better position than its mortgagor. The trial court correctly ruled.

Order affirmed.

GUST JOHNSON v. FIRST STATE BANK OF ROLLINGSTONE.
JEROME SPELTZ, INTERVENER AND APPELLANT.¹

January 2, 1920.

Nos. 21,398, 21,399.

Payment of check — drawer cannot stop payment of drafts issued for check.

Where a check is presented for payment to the drawee, having funds of the drawer to meet it, and the payee, for his own convenience, receives part in cash and part in drafts or cashier's checks of the drawee, the transaction constitutes in law a payment of the check so far as the drawer and drawee are concerned, so that the drawee cannot set up as defense, when sued on the drafts, that the drawer of the check for good cause stopped payment thereon after the drafts were issued and delivered to the payee of the check, nor can the drawer of the check intervene and assert any right in the drafts or claim any relief against the drawee.

Action in the district court for Winona county to recover \$4,000. Jerome Speltz intervened and plaintiff demurred to his amended intervening complaint on the ground that it appeared upon the face thereof that it did not state facts sufficient to constitute a ground for intervention. Plaintiff demurred to the answer of defendant bank on the ground that it did not state facts sufficient to constitute a defense. The demurrers were sustained, Callaghan, J. From the order sustaining the demurrer to its answer, the First State Bank of Rollingstone appealed. From the order sustaining the demurrer to his amended intervening complaint, Jerome Speltz appealed. Affirmed on both appeals.

¹Reported in 175 N. W. 612.

Henry M. Lamberton and Brown, Abbott & Somsen, for appellants.
Otto A. Poirier and Tawney, Smith & Tawney, for respondent.

HOLT, J.

This action was brought to recover \$4,000, the amount of two drafts or cashier's checks drawn by defendant on the Merchants Bank of Winona in favor of plaintiff, and upon which defendant had afterwards stopped payment.

Defendant answered, alleging that plaintiff had entered into an agreement to sell Jerome Speltz certain shares of stock in a land company at \$61 per share and \$224 besides; that Speltz gave to plaintiff his check for \$4,250 on defendant in payment; that through mistake Speltz believed plaintiff owned and was selling him 66 shares of stock and computed the amount due him on that basis; that in fact plaintiff owned but 39 shares; that plaintiff knew of Speltz's mistake and knew that there was due him but \$2,603 and that he took the check with intent to cheat and defraud Speltz; that plaintiff presented Speltz's check to defendant for payment and received \$250 in cash and the drafts or cashier's checks above mentioned; that thereafter, but before the drafts were presented for payment at the Winona bank, Speltz notified defendant to stop payment on the check he gave plaintiff, and thereupon defendant stopped payment on the drafts or cashier's checks it had issued to plaintiff. It is conceded that Speltz had ample funds on deposit with defendant to meet his check when it was there presented by plaintiff, and that defendant had ample funds in the Winona bank to meet its drafts. Defendant demurred to this answer as insufficient to constitute a defense, and the court sustained the demurrer. Defendant appeals.

Speltz, alleging the same state of facts, intervened and asked that his check be canceled and returned to him and that he have judgment against defendant for \$4,000. Plaintiff demurred to the pleading, on the ground that it does not state a cause of action in intervention. This demurrer was also sustained, and intervener appeals.

Defendant is a state bank in which intervener had a checking account at the time of the transaction stated in the pleadings. When plaintiff accepted intervener's check, the law did not regard the transaction as payment absolute for the shares of stock in the absence of an express or

implied agreement that it should be so considered. *First Nat. Bank v. McConnell*, 103 Minn. 340, 114 N. W. 1129, 14 L.R.A.(N.S.) 616, 123 Am. St. 336, 14 Ann. Cas. 396. The drawer of such an instrument may revoke the authority of the drawee to pay, accept or certify it at any time before it is paid, accepted or certified. Appellants contend that the same holds true in respect to the drafts issued by defendant. It is also claimed that, since the enactment of the Uniform Negotiable Instruments Act, the giving of a check or draft cannot be regarded as an assignment, equitable or otherwise, of any part of the funds of the drawer in the hands of the drawee, therefore the drawer has the right to revoke the authority to pay at any time before there has been a written acceptance, or certificate or actual payment of the check or draft. In this case the Speltz check when presented was neither certified nor accepted in conformity with the act mentioned. Was it paid?

When plaintiff presented the check at the banking house of defendant, the drawer, Speltz, had money on deposit to fully meet it. It was presented for payment. Plaintiff received \$250, and, for his own convenience, requested the two drafts or cashier's checks for the balance. No doubt defendant charged Speltz's account with the whole amount. Clearly both plaintiff and defendant considered the transaction as a payment of Speltz's check, for the former parted with the check and the latter with the cash and the drafts which it knew to be good. When this was done no contract obligation remained in respect to the check, either as between plaintiff and Speltz or as between defendant and Speltz. The check had served its purpose and could thereafter be used only as evidence of a past transaction. Had defendant become insolvent before the drafts were paid, or had plaintiff for any other reason failed to get the money therein called for, he could have had no recourse against Speltz on the check nor could he have sued him for the debt or claim the check was given to settle or pay. "When a debtor gives his creditor an order on his bank to pay an indebtedness, having money at the bank to pay it on presentation, and the creditor waives the right to demand cash and accepts bills of exchange from the bank in payment, the debt is satisfied, though the exchange proves worthless." *Loth v. Mothner*, 53 Ark. 116, 13 S. W. 594.

Whether defendant paid the check in cash or with its own drafts or cashier's checks was no concern of Speltz. That was a matter wholly be-

tween plaintiff and defendant. Plaintiff requested the drafts instead of the cash, and cannot well be heard to say that they were not accepted in payment of the check he surrendered. And when plaintiff is content to rest on the obligations created by the drafts issued by defendant in the usual course of business, it ought not to lie in the mouth of the latter to say that the check was not paid by the transaction. Plaintiff owed defendant nothing when he presented the check, and the drafts were not given as provisional payment of any debt or obligation then existing between defendant and plaintiff. They were given and taken instead of money. Bank drafts or bank cashier's checks pass current as money in every day business transactions. When large sums are involved, business men prefer to receive payment in such paper rather than in the coin of the realm. In *First Nat. Bank v. Maxfield*, 83 Me. 576, 22 Atl. 479, the court uses this language in respect to a draft that was surrendered upon the receipt of a check from the acceptor: "The draft in question, in the eye of the law, was paid at maturity, and became dead to the commercial world." See also *Equitable Nat. Bank v. Griffen & Skelley Co.* 113 Cal. 692, 45 Pac. 985, where a bill of exchange drawn on defendant was presented for payment and defendant on the same day gave its check for the amount to plaintiff, and directed that the bill of exchange be returned to it by mail, because the clerk who had the bill in his charge was temporarily absent from the office of plaintiff's agent when the check was there delivered. The bill was so returned marked paid. It was held that the transaction constituted a payment of the bill of exchange, and defendant could not stop payment of the check. *Briggs v. Central Nat. Bank*, 89 N. Y. 182, 42 Am. Rep. 285, also bears out our conclusions that defendant here cannot set up the defense attempted.

Appellants rely on *Hunt v. Security State Bank*, 91 Ore. 362, 179 Pac. 248. There the drawer of the check notified the drawee not to pay after the latter had received the check, properly indorsed, by mail from a bank at a distant city with instructions to remit the amount of the check, and other checks inclosed, "in Portland exchange." When so notified, the drawee had already marked the check paid and had placed it on a spindle with the intention to, later in the day, charge it against the drawer's account and remit the "exchange." The drawee did not remit until after payment was stopped. The court said: "When Hunt (the drawer) or-

dered the defendant not to pay the check the bank had done nothing more than to satisfy itself that the check was genuine, and that there was sufficient funds to pay it, and to stamp it 'Paid,' and to place it upon the spindle. All this was merely preparing to pay; it was simply a step towards payment; it was not payment. No entry was made on the books. The drawer was not charged; the holder was not credited. It may be assumed that the bank intended to make appropriate entries on its books and to remit; but we are confronted with a situation where the bank had not yet executed its intention. An intention to pay is not payment. What the bank did was done in contemplation of payment, but payment was not completed." It is quite clear that the language used in that decision strongly suggests that here, where the payee presented and surrendered the check to the drawee upon receiving part in cash and the balance, at his own request, in these drafts, there was in law a payment of the check before the drawee undertook to stop payment. We think the answer shows no defense.

Reaching that conclusion in respect to defendant's answer, it follows that the intervenor's complaint states no cause for intervention. Speltz did not attempt to stop payment of the check until after defendant had fulfilled all the duties it owed him with reference thereto, namely, to honor it when presented for payment. Speltz could have no claim for the \$250 defendant paid plaintiff, nor could he claim the drafts, or the funds on which the drafts were drawn. It is not a case like *Hoidale v. Cooley*, 143 Minn. 430, 174 N. W. 413, where the intervenor claimed the notes in suit as its property because its agent had wrongfully appropriated the same. Without intimating that Speltz could successfully urge as a ground of intervention in this action that he would otherwise be unable to obtain redress from plaintiff, we may note that there is no allegation that plaintiff is insolvent or that he cannot be made to respond in damages for any wrong committed in the stock transaction.

The orders are affirmed.

STATE EX REL. FLORENCE E. EARLY v. ALBERT WUNDER-
LICH, AS COMMISSIONER OF EDUCATION OF THE
CITY OF ST. PAUL, AND ANOTHER.¹

January 2, 1920.

No. 21,487.

Municipal corporation — appointment to and removal from office.

1. A municipal body or official, having power to appoint an officer or subordinate, has power to remove such appointee in the absence of any law restricting that power.

Same — when removal must be for cause — hearing.

2. Where an appointee can be removed only for cause, he is entitled to a hearing and an opportunity to refute the charges against him, unless the law prescribes a different procedure for making such removals.

Same — when procedure for removal is specified by law.

3. Where the law authorizes an officer to remove an appointee, if in his judgment a cause for such removal exists, and prescribes the procedure which he shall follow in making the removal, the only questions open to examination by the courts are whether the prescribed procedure has been followed, and whether the reasons assigned for the removal are sufficient to justify it.

Same — procedure named in city charter.

4. The charter having prescribed the procedure for making removals without providing for a trial, relator was not entitled to a trial.

Mandamus will not lie to reverse decision of officer empowered to remove.

5. While mandamus will lie to reinstate an appointee removed in violation of law, it will not lie to reverse the decision of an officer empowered by law to determine as a matter of fact whether cause for removal existed.

Decision of commissioner of education not reviewable by mandamus.

6. The commissioner of education, having removed the relator in the exercise of the power vested in him by the charter, and having followed the procedure prescribed by the charter for making such removals, and the reasons assigned for the removal being sufficient to justify it, his decision cannot be reviewed by mandamus.

¹Reported in 175 N. W. 677.

Upon the application of relator the district court for Ramsey county granted its writ of alternative mandamus directing the commissioner of education of the city of St. Paul to reinstate relator in her position as teacher in the public schools of that city and to place relator's name upon the payroll of the city, or show cause why he had not done so. Respondents separately demurred to the petition and writ on the ground that they did not state facts sufficient to entitle relator to the relief demanded. From an order, Haupt, J., sustaining demurrers to the alternative writ of mandamus, plaintiff appealed. Affirmed.

J. P. Kyle, for appellant.

O. H. O'Neill and *W. J. Giberson*, for respondents.

TAYLOR, C.

The relator appeals from an order sustaining a demurrer to her petition for a writ of mandamus and to the alternative writ issued thereon by which she sought to compel the defendants to reinstate her as a teacher in the public schools of the city of St. Paul.

Prior to the year 1914, the schools of the city were controlled by a board of school inspectors which had the power to remove teachers at will. In 1914 the present charter establishing a commission form of government went into effect. The present charter vests the control of the schools in the commissioner of education, subject to the supervisory power of the council, and provides for the appointment of a superintendent of schools and further provides:

"On nomination by said superintendent said commissioner of education shall appoint all assistants to said superintendent, all office assistants to said superintendent, all principals and all teachers in the public schools, all of whom shall be subject to removal by said commissioner on his own motion or on the complaint of said superintendent, by the mayor, or by a two-thirds vote of the members elected to the council, provided that, however removed, the officer making the removal shall state specific reasons therefor in writing, and the person removed shall have an opportunity to reply in writing, and both reasons and reply shall become permanent public records of the office of the commissioner of education. All teachers and supervisors and assistants to the superintendent other than office assistants doing clerical work shall meet the qualifications required

by the state of Minnesota for teachers of like grades in other public schools. It is the intent of this charter that, unless removed for cause as above stated, teachers and assistants once appointed shall serve during efficiency and good behavior. The council may provide for probationary appointment previous to regular appointment, during which time the teachers or supervisor or assistant shall be subject to removal at the pleasure of the commissioner of education."

The relator had been a teacher in the St. Paul schools for six years. On May 23, 1918, the commissioner of education wrote her that he did not feel that he could approve her reappointment for another year, as the advisory staff had reported her work as "not efficient and not of the quality to which the school children of St. Paul are entitled," and that he gave her this advance notice in order that she might voluntarily resign before the appointments for the next year were given out. Relator did not resign, and on June 18, 1918, the commissioner of education preferred formal charges against her to which, on June 28, she made a lengthy reply, in which she asserted that the charges had no foundation in fact. On August 29, 1918, the commissioner informed her that her answer to the specific charges was not satisfactory and that he could not reappoint her to a position in the St. Paul schools.

We deem it unnecessary to discuss the charges preferred further than to say that we are of the opinion that, if true, they were sufficient to justify the action of the commissioner.

It is the general rule that a municipal body or official having the power to appoint an officer or subordinate also has the power to remove the appointee at pleasure in the absence of any law restricting the power of removal. Where the law provides that removals shall be made only for cause, the arbitrary power to remove at pleasure is taken away, and before the appointee can be removed the body or official vested with the power of removal must determine, in the manner prescribed by law, that a cause which the law recognizes as a sufficient ground therefor exists.

The relator cites numerous authorities in support of the proposition that where the law provides that an appointee shall hold his position during efficiency and good behavior, or that he shall be removed only for cause, he is entitled to a trial and an opportunity to controvert the evidence against him, and cannot be removed until he has been accorded

that right. This is a well established general rule, but does not apply where the law points out a different procedure. The manner of making such removals is wholly within the control of the legislature, and when the law which gives the power to remove provides by whom and in what manner that power shall be exercised, the only question open to examination by the courts is whether the statutory requirements have been complied with. Here the commissioner of education had the power to remove; the charges were sufficient in law to justify exercising the power, and the procedure followed was that prescribed by the charter.

The relator asserted in her answer that she had not been derelict in any of the respects alleged, and contends that under the charter provision quoted she was entitled to a trial and an opportunity to controvert the evidence adduced in support of the charges.

The provisions of this same charter in respect to the removal of policemen were under consideration in *State v. McColl*, 127 Minn. 155, 149 N. W. 11, and the court said:

"New York has for many years had a statute containing similar provisions for removal of subordinate municipal officers and employees. It was early held that, while these provisions gave no right to a formal trial, they were intended as a substantial limitation of the general power of removal, and that under these provisions removals can be made only for cause and the process for removal prescribed by statute must be pursued. The cause must be some delinquency or incapacity touching the fitness and the qualification of the officer to discharge the duties of the office; the removing officer may act upon his own knowledge of the facts or upon information furnished him by others, and, upon such knowledge and information and the showing made by the subordinate, he is to judge whether cause for removal exists. In so doing, he must exercise a discretion which the courts cannot control. Such discretion is not, however, unlimited, and it can only be exercised in the manner prescribed by law. *People v. Board of Fire Commissioners*, 72 N. Y. 445; *People v. Thompson*, 94 N. Y. 451, 462. The right of the removing officer is in substance 'a right to judge' the subordinate, and upon the decision, if favorable, to remove him. *People v. Campbell*, 82 N. Y. 247, 252. See also *Truitt v. Philadelphia*, 221 Pa. St. 331, 70 Atl. 757.

"We adopt and follow the foregoing as the correct construction of the

provisions of the charter of the city of St. Paul, and hold that the charter provisions referred to contemplate removals only for cause, the determination of which is for the commissioner."

In *People v. Thompson*, 94 N. Y. 461, cited in the *McColl* case, the New York court said:

"The next inquiry which arises is whether the commissioner committed an error in his decision in refusing to require that evidence should be given to establish the allegations made, and in not allowing testimony to be introduced in favor of the relator. The commissioner was acting by virtue of the statute already cited, and he was bound to follow its provisions, and to fulfil its requirements and nothing more. There is nothing in the statute which requires that the cause of removal shall be established by proof taken before the commissioner. It seems to have been intended that the commissioner should exercise this power upon facts within his own knowledge, or based upon information received by him, after communicating to the relator his purpose of removing him, with notice of the reason why he proposed to take such action, and after allowing him an opportunity to make explanation as to the facts assigned as grounds for the removal. No testimony is required to be taken as to the basis of the commissioner's action; it is enough that he assigns a sufficient cause for the removal, and furnishes an opportunity to the relator for explanation of the same. This tends to prevent removals without any cause whatever, or upon personal or political grounds."

The construction given the New York statute in *People v. Thompson* was approved as correct in *People v. Brady*, 166 N. Y. 44, 59 N. E. 701, and was first stated in *People v. Board of Fire Commissioners*, 72 N. Y. 445, both of which are cited in the *McColl* case. As supporting the same construction of similar statutory provisions see the following: *State v. Register*, 59 Md. 283; *O'Dowd v. City of Boston*, 149 Mass. 443, 21 N. E. 949; *State v. Dahl*, 140 Wis. 301, 122 N. W. 748; *State v. Grant*, 14 Wyo. 41, 81 Pac. 795, 82 Pac. 2, 1 L.R.A.(N.S.) 588, 116 Am. St. 982; *Attorney General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L.R.A. 699, 41 Am. St. 606.

The relator contends that the charter gives a teacher a more secure tenure of office than a policeman, and argues that the construction given the provision governing the removal of policemen should not be con-

trolling in construing the provision governing the removal of teachers for that reason. The charter provides "that unless removed for cause as above stated teachers * * * shall serve during efficiency and good behavior." It provides that policemen "shall retain their positions until discharged, reduced, promoted or transferred in accordance" with the civil service regulations. Neither can be removed arbitrarily; either may be removed for cause; the method of removal is the same in both cases. While the charter places teachers in the unclassified service and policemen in the classified service and authorizes the adoption of civil service rules and regulations for the government of the classified service, the fact that it also provides that the charter requirements must be complied with before persons in the classified service can be removed makes their tenure at least as secure as that of teachers. We find no substantial difference in the tenure. Each is entitled to retain his position until removed in the manner prescribed in the charter, and the procedure to be followed in removing the one is the same as that to be followed in removing the other. The charter prescribes the procedure to be followed in making removals and as it makes no provision for a trial we are of opinion that the relator was not entitled to a trial.

Mandamus will lie to reinstate an officer or appointee unlawfully removed from his position, where it clearly appears as a matter of law from the undisputed facts that he was entitled to retain such position. *State v. Baldwin*, 77 Oh. St. 532, 83 N. E. 907, 19 L.R.A. (N.S.) 49, 12 Ann. Cas. 10, and cases cited in note at page 53 et seq. But mandamus will not lie to reinstate an officer or appointee removed by an official authorized to judge for himself on information within his own knowledge or obtained from others whether cause for removal existed, and who complied with all the statutory requirements in making such removal. Having determined the fact in the exercise of the judgment and discretion vested in him by the statute and in the manner prescribed by the statute, his conclusions cannot be reversed or annulled by mandamus. *People v. Board of Education*, 212 N. Y. 463, 106 N. E. 307; *State v. Register*, 59 Md. 283; *Miles v. Stevenson*, 80 Md. 358, 30 Atl. 646; *State v. Board of Fire Commissioners*, 26 Oh. St. 24; *Pinkerman v. Police Commissioners*, 64 Conn. 517, 30 Atl. 758; *Lunt v. Davison*, 104 Mass. 498; *Gleistman v. West New York*, 74 N. J. Law, 74, 64 Atl. 1084; *State v.*

Commissioners of Pilotage, 23 S. C. 175; Kimball v. Olmsted, 20 Wash. 629, 56 Pac. 377; State v. Dahl, 140 Wis. 301, 122 N. W. 748; Johnson v. City of Galveston, 11 Tex. Civ. App. 469, 33 S. W. 150; Riggins v. Richards (Tex. Civ. App.) 79 S. W. 84; State v. Smith, 49 Neb. 755, 69 N. W. 114; Hartwig v. Mayor, 134 Mich. 615, 96 N. W. 1067.

The charter vested the commissioner with power to determine as a fact whether reasons justifying removal existed, and makes no provision for reviewing or questioning his decision in any manner. The court can determine whether the reasons for removal found by him to exist are sufficient in law to justify the removal, and whether in reaching his decision he has pursued the course marked out by the charter, but it cannot substitute its own judgment for that of the commissioner as to matters of fact which the commissioner was authorized to determine. The commissioner may act on his own knowledge or on information furnished him by others. He is the judge of its sufficiency. Only the conclusions at which he arrives are required to be placed of record, not the knowledge or information on which they are based. Questions of fact which the commissioner is empowered to determine for himself, and which he has determined adversely to the claimant, are not open for examination by the court in a proceeding in mandamus to compel reinstatement. Mandamus does not perform the office of a writ of error and cannot be used for the purpose of reviewing the decision of an officer, board or tribunal which acted within the jurisdiction conferred upon it by law. It will not lie to control or coerce the discretion vested in any municipal or executive officer. It will lie only to compel the performance of a duty which the law clearly and positively requires the officer, board or tribunal to perform. Lauritsen v. Seward, 99 Minn. 313, 109 N. W. 404; State v. Cook, 119 Minn. 407, 138 N. W. 432, Ann. Cas. 1914B, 88; State v. City Council of Brainerd, 121 Minn. 182, 141 N. W. 97, 46 L.R.A.(N.S.) 9; State v. District Court of Waseca County, 126 Minn. 501, 148 N. W. 463, Ann. Cas. 1915D, 198.

The statutory provisions for establishing a pension or retirement fund for teachers and prescribing the conditions on which a teacher may participate therein have no material bearing on the present case.

We find no other questions requiring special mention and the order appealed from is affirmed.

JAMES STEENSON v. FLOUR CITY FUEL & TRANSFER
COMPANY.¹

January 2, 1920.

No. 21,544.

Bailment—burden of proof on bailee.

1. Where an automobile is stolen from a public garage in which it had been stored for pay, the burden is on the garage keeper to show that he was free from negligence.

Same—evidence of negligence.

2. It appearing that defendant had a large number of automobiles in storage and had no one at the garage during the night, that the thieves entered through a window which may have been left open by defendant's employees, and that the doors through which automobiles passed could be opened from the inside of the building at any time by simply unhooking an iron hasp from a staple in the wall, the court cannot say as a matter of law that defendant was free from negligence and the finding of the jury must stand.

Verdict—charge to jury.

3. The amount of the verdict was justified by the evidence. The charge was correct and we find no reversible errors in the rulings at the trial.

Action in the municipal court of Minneapolis to recover \$540, the value of an automobile. The defense set up in the answer was that the storage of automobiles was accepted only on condition that defendant would not be responsible for their loss by theft or fire. The case was tried before Charles L. Smith, J., who at the close of the testimony denied motions by both parties for directed verdicts, and a jury which returned a verdict for the amount demanded. From an order denying its motion of judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Adolph E. L. Johnson, for appellant.

G. A. Will, for respondents.

¹Reported in 175 N. W. 681.

TAYLOR, C.

Defendant operates a garage in the city of Minneapolis in which it receives and stores automobiles for compensation. On the evening of June 10, 1918, it received plaintiff's automobile for storage and issued him a claim check therefor. That night thieves entered the garage and stole the automobile, and defendant was unable to deliver it when demanded the next morning or at any time since. Plaintiff sued for its value and recovered a verdict. Defendant appeals from an order denying its alternative motion for judgment or a new trial.

Where a loss occurs under such circumstances as are here disclosed, the burden is on the bailee to show that he was free from negligence, that is, that he exercised such care to keep the property safely as a prudent man would ordinarily exercise under such or similar circumstances. *Hoel v. Flour City Fuel & Transfer Co.* supra, page 280; *Rustad v. Great Northern Ry. Co.* 122 Minn. 453, 142 N. W. 727. Whether the requisite degree of care has been exercised is usually, but not always, a question for the jury. The facts may be so conclusive as to make it a question of law for the court.

This garage was 100 feet by 120 feet in size and fronted on two streets at the intersection of which it was located. In one end of the building partitions had been erected so as to provide an office, a stock-room which opened into the office, and a small repair shop. The remainder of the building was used for storage purposes, and there is testimony that it was full of automobiles and trucks on the night in question. Defendant had a so-called night man who went on duty at one o'clock in the afternoon and remained until midnight or a few minutes later, and who was required to see that the windows and doors were closed and locked when he left. Defendant had no one at or in charge of the garage during the remainder of the night. There were two wide doorways through which automobiles could be taken in or out. At night these doorways were closed by sliding doors which were fastened on the inside by iron hasps hooked into staples in the wall. These hasps could be easily unhooked and the door opened at any time by any person inside the building. When the theft was discovered on the morning of June 11, one of these doors was found unfastened and a window in the back of the garage was found open. There was evidence from which the jury could find that this window had

been left open by defendant's employees, and that the thieves entered through it. They broke open the door to the stock-room with a bar or jimmy and took all the tires and tubes therein. They also took two automobiles, the one belonging to plaintiff and another belonging to A. P. Newman. On the state of facts disclosed, the court could not hold as a matter of law that defendant was free from negligence and this question was for the jury.

The court submitted the case to the jury in a charge which was clear, correct and complete, and which covered sufficiently all of defendant's requests that defendant was entitled to have given.

Defendant challenges certain rulings excluding evidence. The evidence offered to show the charge made by defendant for storing automobiles, and to show that defendant had several of its own trucks and automobiles stored in the garage on this night, might well have been received, but under the facts of this case we think its exclusion was not reversible error. There was no conflict in the evidence except as to the value of the automobile and as to whether the window was closed when the night man left shortly after midnight.

Defendant contends that the verdict was excessive. The only evidence as to the value of the automobile was the testimony of plaintiff and the testimony of one witness presented by defendant. The jury took the value as fixed by the plaintiff and there is nothing in the record from which we can say that they were not justified in doing so.

Order affirmed.

STATE v. HENRY TAYLOR.¹

January 2, 1920.

No. 21,551.

Criminal law — verdict sustained by evidence.

1. The evidence, though not entirely free of doubt, is *held* sufficient to sustain the verdict of guilty.

Same — new trial granted because of prejudicial cross-examination.

2. The extent to which the cross-examination of a witness upon col-

¹Reported in 175 N. W. 615.

lateral matters to affect his credibility may be pursued is largely discretionary, but in this case, where the county attorney conducted a prolonged cross-examination of the defendant, which carried insinuations as to the character and disposition of the defendant which were likely to be applied by the jury unfavorably to him in considering the particular issue and not confined to its proper scope, it was prejudicial and a new trial should be had.

Defendant was indicted by the grand jury of Wilkin county charged with the crime of taking indecent liberties with the person of a female child under the age of 14, tried in the district court for that county before Flaherty, J., and a jury which found him guilty as charged. Defendant's motion for a new trial was denied. From the judgment of conviction, sentencing him to imprisonment in the state prison for a period of not to exceed one year and six months, defendant appealed. Reversed.

Lewis E. Jones and Leonard Ericksson, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, and *E. H. Elwin*, County Attorney, for respondent.

DIBELL, J.

The defendant was convicted of taking indecent liberties with a female child under 14 years of age, and appeals.

1. The conflict in testimony is positive. The girl affirms that an offense was committed and the defendant denies it. The girl is corroborated by the fact of a prompt complaint made to her mother. Her testimony is in some respects confused and she contradicts herself materially. The defendant produced several character witnesses. The evidence, though not entirely free of doubt, is sufficient to sustain the verdict.

2. The cross-examination of the defendant was all upon collateral matters. It tended to show that he had been something of a wanderer, going back and forth for a number of years from Missouri to Minnesota. He had lived on a farm in the county for three years, or at least that was his claim. At the time of the offense alleged he had some sort of a shoe and harness shop in Foxhome.

As much as one-third of the cross-examination was directed to the alleged conduct of the defendant in taking a young woman of the vicinity to Fargo, the plain implication being that he did so for improper pur-

poses, and to questions suggesting that his wife had given him \$500 or some other sum to leave her. Not all of such questions were permitted and nothing very harmful was actually proved, but the constantly pressed insinuation was that the defendant was a bad man in his association with this woman and that he had trouble in his domestic relations, and that evidence if admitted would prove it. To one charged with the crime alleged in the indictment it was necessarily prejudicial. It would give the jury the notion that a man such as he was suggested by innuendo to be was more likely to commit such a crime. The extent to which testimony may be received to affect credibility, though upon collateral matters, is largely for the trial court. *Gardner v. Kellogg*, 23 Minn. 463; *State v. Quirk*, 101 Minn. 334, 112 N. W. 409; *State v. Phillips*, 105 Minn. 375, 117 N. W. 508; 3 Dunnell, Minn. Dig. and 1916 Supp. § 10348. The questions asked and persistently urged so remotely affected the defendant's credibility and were so likely to be applied by the jury unfavorably to him in their consideration of the issue involved and not restricted to their proper scope that a new trial should be had. *Malone v. Stephenson*, 94 Minn. 222, 102 N. W. 372; *Howard v. Farr*, 115 Minn. 86, 131 N. W. 1071; *State v. McCoy*, 112 Minn. 424, 128 N. W. 465; *Petruschke v. Kameron*, 131 Minn. 320, 155 N. W. 205; 3 Dunnell, Minn. Dig. and 1916 Supp. § 10348.

In reaching this conclusion we note the trial court's view that the defendant was guilty, and but for the persistent and prejudicial questioning we would not disturb the result. The trial court was entirely fair, and it was commendably careful of the defendant's rights when the time for sentence came. There was a suggestion then that the defendant at times was mentally affected. The interests of justice will be subserved by a new trial.

Judgment reversed.

HALLAM, J. (dissenting).

In my opinion the conduct of the county attorney in asking questions was not such misconduct as to warrant a reversal. See *State v. Quirk*, 101 Minn. 334, 112 N. W. 409; *State v. Johnson*, 114 Minn. 493, 131 N. W. 629.

CARR-CULLEN COMPANY v. JUSTIN J. COOPER.

SAME v. LISETTE S. LARAWAY AND OTHERS (2 CASES).

SAME v. JOHN KIRK AND OTHERS.

SAME v. JAMES STODDART AND OTHERS.

SAME v. FLORA BOASBERG AND OTHERS.

NORTHLAND PINE COMPANY, APPELLANT.¹

January 2, 1920.

Nos. 21,553, 21,554, 21,555, 21,556, 21,557, 21,558.

Mechanic's lien — one lien statement for six houses.

1. The evidence is stated and held to require a finding that a material-man contributed to the erection of six dwelling houses on eight adjoining lots under and pursuant to the purposes of one general contract and had a right to file one lien statement for its entire claim, embracing all the lots, as provided by section 7027, G. S. 1913.

Same — voluntary appearance of defendants.

2. A voluntary appearance in an action to foreclose a mechanic's lien is the equivalent of the service of a summons upon the person so appearing. If a party so far appears as to call into action the powers of the court for any purpose except to decide upon its own jurisdiction, it is a full appearance. The acts of the defendants who are here questioning the jurisdiction of the district court over them amounted to a voluntary general appearance.

Appeal and error — omission to file lis pendens waived.

3. The failure of one who is proceeding to foreclose a mechanic's lien to file a notice of lis pendens, as required by section 7030, G. S. 1913, cannot be taken advantage of for the first time on appeal to this court.

Mechanic's lien may be set up by answer to complaint of another claimant.

4. A lien claimant may assert a mechanic's lien by answer in actions brought by another lien claimant to foreclose its lien on the same property, and may enforce its lien in such actions as to all persons who are made parties thereto within one year from the date of furnishing the last item mentioned in its lien statement.

¹Reported in 175 N. W. 696.

Actions in the district court for Hennepin county to foreclose mechanic's liens. The cases were consolidated and tried together before Dickinson, J., who made findings and ordered judgment in favor of appellant for the amount demanded, but denied its right to a lien. From judgments entered pursuant to orders for judgment, the Northland Pine Company appealed. Reversed.

Elijah Barton, for appellant.

Josiah E. Brill, Arthur H. Anderson, Edward T. Teitsworth, J. B. Faegre and C. G. Krause, for respondents.

LEES, C.

In six actions brought by the Carr-Cullen Company for the foreclosure of as many mechanic's liens, the Northland Pine Company filed answers, claiming one lien on eight adjoining lots in the city of Minneapolis on which six dwelling houses had been built, and asked for the foreclosure of its lien. The owners of the lots and the assignees of mortgages thereon contested its claim to a lien, and it appeals from an adverse judgment in each of the actions.

1. The principal question mooted is whether it had a right to a lien on the property as a whole, or whether its claim grew out of separate and distinct transactions with the owner and builder of the houses. It is conceded that appellant furnished building materials used in the construction of the houses, but the court found that such materials were not furnished under or pursuant to the purposes of one general contract with the owner of the property, as provided by section 7072, G. S. 1913.

These are the material facts relating to this question: In March, 1916, the lots were owned by one Cooper, a contractor and builder, who was about to erect six dwelling houses on them, dividing them so that each house would occupy a portion of two lots. Appellant offered to furnish the lumber and other building materials required to construct the houses and a price was agreed upon. Cooper began to build in April, 1916. The construction of the houses was a continuous enterprise and was part of one general improvement or connected undertaking which he prosecuted as one job until he sold out to the Colfax Holding Company. The materials were furnished for the general purpose of enabling him to build this group of houses and were ordered from time to time as needed. Appel-

lant billed them to him under the heading "Job 50th and Colfax." The houses were located on Colfax avenue and Fiftieth street. No separate account was kept of the materials which entered into the construction of each house, but when appellant's teamster delivered a load he would get the signature of Cooper's foreman on a slip on which the materials delivered were listed, as a receipt therefor. On these slips the street number of the house at which the load was delivered would be entered.

On October 26, 1916, Cooper mortgaged each of the houses separately to Thorpe Brothers, and they assigned the mortgages to persons who were made defendants in the Carr- Cullen actions.

On May 29, 1917, having substantially completed two and partially completed four of the houses, Cooper conveyed the entire property to the Colfax Holding Company, also a defendant in the actions.

Appellant has never been paid for any of the materials it furnished, and the amount of its just claims is \$6,070.74.

The Carr-Cullen actions and one instituted by Perl Brothers to foreclose a lien on the entire property were consolidated for trial and tried together. Respondents requested the court to find the value of the materials used in each house in order that appellant's claim might be apportioned among them in case it was held that it was entitled to a lien, and the court did so.

Upon this state of facts, we hold that appellant contributed to the erection of the six houses under and pursuant to the purposes of one general contract with Cooper; that it had the right to file one lien statement for its entire claim embracing all of the eight lots, and that the provisions of section 7027, G. S. 1913, are applicable within the rules laid down by this court in *Frankoviz v. Smith*, 34 Minn. 403, 26 N. W. 225; *Lax v. Peterson*, 42 Minn. 214, 44 N. W. 3; *Gardner v. Leck*, 52 Minn. 522, 54 N. W. 746; *Johnson v. Salter*, 70 Minn. 146, 72 N. W. 974, 68 Am. St. 516; *Northwestern L. & W. Co. v. Parker*, 118 Minn. 211, 136 N. W. 855; *American Bridge Co. v. Honstain*, 120 Minn. 329, 139 N. W. 619; *Paine & Nixon Co. v. Dahlvick*, 136 Minn. 57, 161 N. W. 257, and *Northland Pine Co. v. Melin*, 142 Minn. 233, 171 N. W. 808. There is nothing in *Fitzpatrick v. Ernst*, 102 Minn. 195, 113 N. W. 4, running counter to the holdings in the cases above cited, the distinction being pointed out in *American Bridge Co. v. Honstain*, *supra*.

2. The next question is whether the court had jurisdiction over the owners of the several houses and the assignees of the mortgages in the proceeding for the foreclosure of appellant's lien. The record is involved and confusing, and we have had no little difficulty in ascertaining the precise situation.

The Carr-Cullen Company filed a separate lien claim on each of the houses. Perl Brothers and appellant each filed one lien statement covering all the lots. The first item in appellant's claim was furnished on April 8, 1916, and the last on January 15, 1917. It filed its lien statement on April 3, 1917.

Respondent Beutner purchased one of the houses from Cooper on July 6, 1916, taking a contract for deed under which he went into possession in February, 1917. Respondent Capper purchased another in the same way and went into possession at some time prior to January 1, 1917. Jennie and Joseph Brechet took a deed from the Colfax Holding Company to a third house on September 20, 1917. The Colfax Company is the owner of the three remaining houses.

Cooper, the Colfax Company, Perl Brothers and appellant were made defendants in all of the actions brought by the Carr-Cullen Company. In the action affecting the Beutner and Capper property, each respectively was made a defendant. The Brechets were not made defendants in the action affecting their property. The complaint in that, as in all the other actions brought by the Carr-Cullen Company, was filed July 5, 1917, and appellant's answers were filed August 13, 1917. Perl Brothers made Cooper and the assignees of the mortgages defendants in their action. Beutner filed an intervening complaint in that action asking that Capper, the Brechets, the Colfax Company and others, be made parties to assert such defenses as they might have to his complaint, and that all valid liens upon any of the property be marshalled. On November 15, 1917, these persons were made parties to the Perl Brothers' action. The Colfax Company answered, asking that lien claimants, who claimed an entire lien upon the whole property originally owned by Cooper, be required to apportion their liens so as to subject each tract separately owned and mortgaged to a lien for the amount fairly chargeable to it. It was stipulated that this answer should be taken as the answer of Capper and the Brechets to the Beutner complaint in intervention. Beutner had theretofore ap-

plied to the court for an order consolidating for trial the six actions brought by the Carr-Cullen Company with the Perl Brothers' action. Such an order was made August 14, 1917. Beutner answered and filed a cross-complaint in the Carr-Cullen action in which he had been made a party defendant. On December 5, 1917, it was stipulated that the answer of the Colfax Company to Beutner's complaint in intervention should be taken as the answer of Capper and the Brechets to his cross-complaint. On December 12, 1917, the Colfax Company made a similar stipulation in its own behalf. All of the actions as consolidated came on for trial April 17, 1918. In the course of the trial it was stipulated by the owners of all the property that the apportionment of the value of appellant's materials contained in each of the houses, as made by Cooper in his testimony, was correct. Capper was not served with a summons nor originally made a party to any of the actions. In the action affecting the Beutner property, it was stipulated that the case proposed for settlement preliminary to an appeal to this court might be settled without notice. Capper and the Colfax Company were parties to this stipulation.

We have taken pains to set out in detail all the portions of the record we have discovered which may have a bearing on the question now under consideration.

As to Beutner, there can be no doubt about the jurisdiction of the court. He was a party to the actions and actively resisted appellant's claim to a lien.

As to Capper, we are satisfied that, by appearing as he did and taking part in the trial of the actions, he subjected himself to the jurisdiction of the court. A voluntary appearance is the equivalent of personal service unless made for the sole purpose of attacking the court's jurisdiction. Section 7741, G. S. 1913. If a party so far appears as to call into action the powers of the court for any purpose except to decide upon its own jurisdiction, it is a full appearance. He appears generally when he takes or consents to any step in a case which assumes that jurisdiction exists. *Curtis v. Jackson*, 23 Minn. 268; *Johnson v. Hagberg*, 48 Minn. 221, 50 N. W. 1037; *St. Louis Car Co. v. Stillwater Street Ry. Co.* 53 Minn. 129, 54 N. W. 1064. A voluntary appearance in an action to foreclose a mechanic's lien is the equivalent of the service of a summons upon the person so appearing. *Hokanson v. Gunderson*, 54 Minn. 499, 56 N. W.

172, 40 Am. St. 354. Capper is not in a position to assert that he conferred jurisdiction upon the court, only to the extent of determining the issues, if any there were, between him and Beutner. The several actions brought and consolidated were so interwoven that they finally became virtually one action.

All that has been said relative to Capper is applicable to the Colfax Company. In addition thereto we note that it was a party defendant in each of the Carr-Cullen actions, and there is no finding that it was not served with the summons issued therein. There is no merit in its contention that it was not in court insofar as appellant's proceeding to foreclose its lien is concerned. The Brechets purchased, subsequent to the commencement of the actions, from the Colfax Company, a defendant therein. It does not appear that appellant filed a notice of lis pendens as required by section 7030, G. S. 1913, but the omission, if none was filed, was not called to the attention of the trial court and is suggested for the first time on these appeals, and hence is of no avail. *Julius v. Callahan*, 63 Minn. 154, 65 N. W. 267.

The assignees of the mortgages were made parties defendant and the mortgages were taken during the open construction of the houses, hence their rights are subject to mechanic's liens properly acquired and perfected. *Minneapolis Sash & Door Co. v. Hedden*, 131 Minn. 31, 154 N. W. 511.

The contention of all of the respondents is that appellant has not asserted its lien rights against them within one year from the date of the furnishing of the last item mentioned in its claim for lien. The dates of the several occurrences we have detailed refute this contention. Appellant asserted its lien on August 13, 1917, when it filed its answers in the Carr-Cullen cases. All of the respondents became parties to the consolidated actions in the manner we have pointed out prior to January 15, 1918, when appellant's right to enforce its lien expired, and the court had jurisdiction to determine the lien set up by appellant in its answers. *Menzel v. Tubbs*, 51 Minn. 364, 53 N. W. 653, 1017, 17 L.R.A. 815; *Miller v. Condit*, 52 Minn. 455, 55 N. W. 47; *Sandberg v. Palm*, 53 Minn. 252, 54 N. W. 1109; *Burns v. Phinney*, 53 Minn. 431, 55 N. W. 540.

Appellant should have been given judgment for a lien upon the whole of the real property described in its lien statement for the full amount

of its claim. Such amount should be apportioned among the several owners of the property so that its lien against each of the six parcels into which the eight lots were divided will be limited to the sum which the court found to be the value of the materials furnished by appellant which entered into the construction of the house located thereon.

The judgments appealed from are reversed and the cases remanded for further proceedings in accordance herewith.

Judgments reversed.

ZENITH BOX & LUMBER COMPANY v. NATIONAL UNION
FIRE INSURANCE COMPANY AND OTHERS.¹

January 9, 1920.

No. 21,444.

Insurance — blanket policies for full amount on each place.

1. Certain policies of insurance on forest products at eight locations "on Saari Brothers Railroad" are *held* to be blanket policies, not pro-rated among the specific locations, but covering each to the full amount.

Same — construction of policies.

2. Such policies are also *held* to cover products adjacent to locations specified, not piled or banked, but ready for loading, and left for the purpose of being loaded without being banked. Such products were "situated" at such locations within the meaning of the policies.

Reformation of policy.

3. An insurance agent, who, without the knowledge of the insured, procures another agent to write the risk, dividing commissions with him, is not authorized, as an agent of the insured, to make terms, or to bind the insured by stipulations not embodied in the policies and not known to him, and the insurer is not entitled to have the policies reformed to conform to terms agreed upon between the insurance agents.

Action in the district court for St. Louis county to recover on five fire insurance policies. The facts are stated in the opinion. The case was tried before Dancer, J., who made amended findings and ordered judgment against the National Union Fire Insurance Company, the West-

¹Reported in 175 N. W. 894.

chester Fire Insurance Company, and the Germania Fire Insurance Company in specified amounts. From an order denying their motion for amended findings or for a new trial, defendants appealed. Affirmed.

Fryberger, Fulton & Spear and Nathan H. Chase, for appellants.

Larson & Marsch, for respondent.

HALLAM, J.

1. Action to recover on five policies of insurance, one issued by each of defendants, on timber products then owned by Saari Brothers, but later sold to plaintiff. Saari Brothers were engaged in logging operations in St. Louis county. A special agent of the Westchester Fire Insurance Company went over the lands and estimated the timber, brought some information to Mr. Kriedler of Kriedler-Doyle Company, agent for the Westchester Company, and told him that Saari Brothers desired insurance on their products. He also solicited Mr. Jacob Saari to call up Mr. Kriedler, which Mr. Saari did. Information was given by Saari as to material at eight locations, giving value at each, aggregating \$66,549, and Kriedler-Doyle Company issued a policy insuring Saari Brothers at 90 per cent of said value, or \$59,893.

Later the Westchester Company ordered Kriedler-Doyle Company to cancel this policy. Thereupon Kriedler, without the knowledge of Saari Brothers, went to McGregor-Bradley Company, insurance agents, and procured them to write the five policies here sued on, in companies of which they were agents, Kriedler receiving one-half of the commissions paid by the companies therefor. The insurance aggregated \$59,893. Riders designating property insured and the amount and terms of insurance were attached to each policy. They are all like the following except as to the figures at the top:

“\$50,000.00 on stock, consisting chiefly of lumber, shingles, pickets, lath, ties, poles, posts, pulp-wood, cord wood, slabs, logs, and all forest and timber products of every description, manufactured, unmanufactured and in process of manufacture; their own or held by them in trust or on commission or sold but not delivered or removed, or where the legal or equitable title is in said assured or where such stock has been produced or partially produced under contract and which contained the provision

or understanding that title passes to the assured although a final payment may not have been made, while situated at the following described premises, all on Saari Brothers Railroad, in St. Louis County, Minnesota, to-wit:

- (1) \$ 1,889.00 Between Camp No. 1 and Summit.
- (2) 14,353.35 Between Camp No. 1 and Section 33 Spur.
- (3) 9,144.45 Between Camp No. 1 and Kickback.
- (4) 10,000.00 At Kickback Spur Proper.
- (5) 1,266.65 Between Kickback Junction and North Line Section 7.
- (6) 8,155.55 Between North Line Section 7 and County Road.
- (7) 17,740.00 Between County Road and Waterhen (creek).
- (8) 4,000.00 Between Waterhen and Camp 1 in Sections 19 and 20.

\$66,549.00 Total.

"Should the property hereby insured be or become separated 50 feet or more by streets, roadways, alleys, water spaces or other spaces (not commonly used for piling ground or temporarily vacated), then it is hereby agreed that such separation shall constitute a separate division or location and the following shall then be considered a part of this policy."

"AVERAGE CLAUSE.—It is hereby agreed in case of loss this policy shall attach in or on each building, division or location in such proportion as the value in or on such building, division or location bears to the aggregate value of the property insured."

"Additional concurrent insurance is hereby permitted."

"CO-INSURANCE CLAUSE:—In consideration of the acceptance by the assured of a reduction from the established rate of 10 per cent to 5 per cent it is hereby agreed that the assured shall maintain insurance during the life of this policy upon the property hereby insured to the extent of at least 90 per cent of the actual cash value at the time of the fire, and that failing so to do, the insured shall, to the extent of such deficit, bear his, her or their proportion of any loss, and it is expressly agreed that in case there shall be more than one item or division in the form of this policy this clause shall apply to each and every item."

Fires occurred at locations 2, 3, 6, 7 and 8. The total value of material destroyed was \$55,543.19. The court, trying the case without a jury, construed the policies as giving blanket insurance, that is, insurance not

prorated among the specific divisions, but covering each division to the full amount, and, after applying the average clause, gave judgment to plaintiff for \$43,027.24.

When the language of the policies is all considered, this seems to be the fair interpretation of them. Each provides for a stated amount of insurance, less than the total of the specific values given, each specifies what shall constitute separate "divisions or locations," and the average clause and that clause alone, in each policy, specifies how the total amount of insurance is to be apportioned among such divisions or locations.

But if the language is in doubt, the attending circumstances confirm the trial court's construction.

Each policy had indorsed thereon, in typewriting, when delivered by the agents, the words: "Floater form." This word "floater" is commonly used synonymously with the word "blanket."

The rate charged was the highest rate charged for insuring this character of property, viz. 10 per cent, reduced by reason of coinsurance to 5 per cent, and this is the rate charged for blanket insurance, but far in excess of the rate charged for specific or prorated insurance.

Where policies are written covering several items and the amount is to be prorated it is customary to so stipulate, as by stating that the insurance is a "prorata share" of the amount of the policy upon each item or location. The agents who wrote these policies were experienced agents and understood this practice, but no such language was used in any of these policies.

Defendant contends that this construction renders useless the description and enumeration of the locations where the property was situated. It is true that with such a construction this descriptive matter is not of vital importance, yet it is not senseless to describe the locations with this detail. We think the language quite as important as is much of the verbiage contained in the first paragraph of the rider.

Defendant contends that with this construction the amounts set down opposite each location mean nothing. Mr. McGregor, of the company that wrote the policies, testified that he understood the figures were the "values" of the property at the respective locations. It was not necessary that these separate values be inserted in the policies, but, since the agents for defendants saw fit to insert the figures for that purpose, we need not concern ourselves with the importance of their so doing. It is not now

claimed that the insurance was for these specific amounts at each location. The claim is that these amounts indicated the proportions of insurance upon each location, for example, 1,889/66,549 upon the first location. The policies do not so provide. This seems to us a strained construction of their language.

The contention of defendants that the "average clause" was only intended to apply to separations of 50 feet or more within each of the eight locations mentioned, and that the policies were "blanket" as to each location, but not as to the whole, does not seem to us to be borne out by any language of the policies. We do not sustain the contention.

Taking into account the well recognized principle that in construing a policy of insurance, prepared by the insurer, all reasonable doubt must be resolved in favor of the insured, *DeGraff v. Queen Ins. Co.* 38 Minn. 501, 38 N. W. 696, 8 Am. St. 685; *Anoka Lumber Co. v. Fidelity & Casualty Co.* 63 Minn. 286, 65 N. W. 353, 30 L.R.A. 689, we have no difficulty in determining that the trial court properly construed these policies as blanket policies.

2. There were at each location certain products banked on the landings of said railroad and within 300 feet of said railroad on each side. Concededly the policies covered these products. There were also on the premises of Saari Brothers at locations 7 and 8, adjacent to the railroad, and extending for a distance of not to exceed one-quarter mile on each side and at no point separated from the other property along the railroad by spaces of 50 feet, large quantities of forest products of the kind described in the policies, but not piled or banked. The court held that the policies covered these products. We agree with this. These logs had been cut and swamped upon the premises, were ready for loading, and were left for the purpose of being loaded without being banked. We think they were "situated" at locations 7 and 8 within the meaning of these policies. The language is general; the extent of the location is not defined; landings or piled logs are not mentioned at all. These logs or some of them, at least, were included in the total figures given by Saari to the insurance company.

Precedent may not help much in applying these policy contracts to the peculiar facts of this case, but we think the authorities tend to sustain

this contention. *Pettit v. State Ins. Co.* 41 Minn. 299, 43 N. W. 378; *Burnam v. Banks*, 45 Mo. 349.

3. Defendant contends that if the policies bear the construction we place upon them, then they fail to express the real agreement of the parties and should be reformed. It is not contended that any different agreement was made with Saari Brothers personally, or they or plaintiff knew until after the fire that any other agreement was said to have been made. The claim is that Kreidler, when he placed the insurance through the McGregor-Bradley Company, agreed with them that the policies issued should provide that the insurance should be prorated among the eight locations mentioned in proportion to the amounts appearing in the schedules, with a coinsurance clause to be applied to each separate location, and that in so doing he acted as the agent of Saari Brothers. There is no claim that he was given any such express authority. The claim is that when a broker "or even an insurance agent requests insurance for a company which he does not represent, he is acting as the agent of the assured and not of the insurer," and that therefore defendant should have been permitted to prove this alleged agreement between Kreidler and McGregor-Bradley Company, and that the policies should be reformed to incorporate such provisions into their terms. This contention does not seem to require extended discussion. It is a matter of common knowledge that appointed agents of insurance companies, on procuring applications for insurance, not infrequently, on their own initiative, procure agents for other companies to write part or all of the risk. To hold that an insurance agent, by so doing, becomes a general agent of the insured, vested with power to bind the insured by terms not embodied in the policy and terms of which the insured never knows, seems to us impossible. *Fredman v. Consolidated F. & M. Ins. Co.* 104 Minn. 76, 116 N. W. 221, 124 N. W. 608, does not point towards such a conclusion. In that case the court held that the statutes of this state, citing sections which are now sections 3297, 3322, 3607, G. S. 1913, make "every insurance agent or broker who acts for another in negotiating a contract of insurance" the agent of the insurance company for the purpose of collecting or securing the premiums, but that "except as thus declared, the powers of an insurance broker are not determined by the statute, but are left to be determined by contract between the parties," and that the statutes cited

do not purport to define the scope of the agency of the broker. It was held that a broker had no implied authority to bind the insurer by agreements not embodied in the policy written. It is just as clear that a broker has no implied authority to bind the insured by agreements not embodied in the policy delivered to him. Clearly there is no statute which, either expressly or by implication, makes an insurance broker the general agent of the insured.

Kreidler received his pay from the defendant insurance companies. There is no proof or offer of proof that he was authorized to enter into any contract for Saari Brothers of any different tenor from that embodied in the policies issued to them. The court properly rejected the proffered evidence of what transpired between the insurance agents among themselves.

Order affirmed.

C. L. MULLINER, AS ADMINISTRATOR OF THE ESTATE OF
LAWRENCE GROTE, DECEASED v. EVANGELISCHER
DIAKONNIESENVEREIN OF THE MINNESOTA
DISTRICT OF THE GERMAN
EVANGELICAL SYNOD OF
NORTH AMERICA.¹

January 9, 1920.

No. 21,518.

Death — verdict sustained by the evidence.

1. A pneumonia patient in defendant's hospital, suffering from delirium, was left alone in a second story room. A few minutes later the window was found open and the patient was lying dead on the ground below. This was sufficient evidence to sustain a finding that he was killed by the fall.

Same — evidence of negligence.

2. There is sufficient evidence that his death was due to negligence of defendant and its employees.

¹Reported in 175 N. W. 699.

Same — charitable corporations liable in damages.

3. Defendant is of the class commonly known as charitable corporations. Its hospital was founded and its buildings erected, partly by money donated, and partly by money borrowed. It is not maintained for profit, but most of its patients are pay patients, and the receipts for these patients largely exceed the cost of maintenance. Defendant is liable in damages for decedent's death.

Action in the district court for Rice county to recover \$7,500 for the death of plaintiff's intestate. In its answer defendant set up that it was a private charitable corporation, its object and purpose, and that its work was wholly charitable and not for private profit, and expressly denied that the intestate's death was caused by carelessness, negligence or want of care on its part. The case was tried before Childress, J., who at the close of the testimony denied defendant's motion for a directed verdict on the ground that defendant was a charitable corporation and not liable for the negligence of its agents, servants and employees to a patient in its hospital, and a jury which returned a verdict for \$6,500. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

C. D. O'Brien and J. W. LeCrone, for appellant.

Moonan & Moonan, for respondent.

HALLAM, J.

1. Defendant operated a hospital in the city of Faribault. On February 27, 1918, Lawrence Grotte, a pneumonia patient, was taken to the hospital. He continued as a patient until about 6 a. m. on March 3 when, in delirium, he jumped from the window of a second story room and was killed. Plaintiff, as administrator of his estate, sued for damages, and recovered a verdict for \$6,500. Defendant appeals.

There is sufficient proof of the cause of death. The fact is, deceased was left lying on his hospital bed. He was very ill, but his chances of recovery up to that time were "rather favorable." The nurse in charge left the room, leaving the window slightly open. Five minutes later the window was found wide open and deceased was lying dead on the ground below. The jury might well find that he was killed by the fall. In fact they could not well find otherwise.

2. There is sufficient evidence of negligence on the part of defendant and its employees. Deceased became delirious about one o'clock in the morning of March 1. He became violent and got out of bed. The lady nurses could not control him, so they called a man, the janitor, and with his help put deceased in a restraining sheet. At 8:30 in the evening of March 2 he again broke loose and walked down the hall. At 12:30 a. m. March 3 he again broke loose. The evidence is that the tendency of patients in his condition is to try to escape through the first opening. At about 6 a. m. he was left alone in the room. The window was open five or six inches. The result was as above stated.

The nurse in charge testified that she felt that deceased needed watching; that he was in a dangerous condition where he might commit injury to himself; that if she had had more help she would have thought it proper to watch him closer, and that the only reason she did not watch him closer was that she had so much work that she could not do so. This evidence is sufficient to sustain a finding that defendant was negligent in failing to provide a sufficient number of attendants, and that the attendants were negligent in failing to exercise proper care for the patient's safety.

3. If this were a hospital maintained for the profit of the owners, liability for such negligence would be undoubted. When a patient enters such a hospital, knowing that the number of nurses is less than the number of patients, he may not expect constant attendance, but the patient is entitled to such reasonable attention as his safety may require. *Meyer v. McNutt Hospital*, 173 Cal. 156, 159 Pac. 436; *Hoke v. Glenn*, 167 N. C. 594, 83 S. E. 807, Ann. Cas. 1916E, 250; *Hogan v. Hospital Co.* 63 W. Va. 84, 59 S. E. 943; *Fawcett v. Ryder*, 23 N. D. 20, 135 N. W. 800; *Wetzel v. Omaha M. & G. Hospital*, 96 Neb. 636, 148 N. W. 582, Ann. Cas. 1915B, 1224; *Stanley v. Schumpert*, 117 La. 255, 41 South. 565, 6 L.R.A.(N.S.) 306, 116 Am. St. 202, 8 Ann. Cas. 1044. If the patient is temporarily bereft of reason, and is known by the hospital authorities to be in danger of self destruction, the authorities are in duty bound to use reasonable care to prevent such an act. *Broz v. Omaha M. & G. Hospital*, 96 Neb. 648, 148 N. W. 575, L.R.A. 1915D, 334.

A more serious question is whether a hospital corporation, constituted as is defendant, is liable to a patient for damages resulting from the neg-

ligence proven. Defendant corporation was organized for the maintenance of a private hospital. The ground upon which the hospital building stands was donated. The building was erected partly by money donated and partly by money borrowed. The corporation has no capital stock and pays no dividends. Its funds are used for the maintenance of the hospital. It is not a free hospital. It has a regular schedule of rates which patients are expected to pay. More than 95 per cent pay full rates. The remaining small percentage are free or partly free. The receipts from the pay patients exceed the cost of maintenance, including repairs, by more than \$5,000 a year. Deceased was a pay patient.

Defendant comes within the class commonly known as charitable corporations. The fact that its patients pay for their accommodations does not make it otherwise. The distinguishing facts are that it is partly endowed by donation, and that it is not conducted for purposes of gain. 5 R. C. L. p. 373; *McInerny v. St. Luke's Hospital Assn.* 122 Minn. 10, 141 N. W. 837, 46 L.R.A.(N.S.) 548; *Parks v. Northwestern University*, 218 Ill. 381, 75 N. E. 991, 2 L.R.A.(N.S.) 556, 4 Ann. Cas. 103.

There are numerous carefully considered decisions holding that such a corporation is not responsible to a patient for the negligence of its employees. 5 R. C. L. 375; *Union Pac. R. Co. v. Artist*, 60 Fed. 365, 9 C. C. A. 14, 23 L.R.A. 581; *Powers v. Mass. Homeopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L.R.A. 372; *Hearns v. Waterbury Hospital*, 66 Conn. 98, 33 Atl. 595, 31 L.R.A. 224; *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Downes v. Harper Hospital*, 101 Mich. 555, 60 N. W. 42, 25 L.R.A. 602, 45 Am. St. 427; *Duncan v. Nebraska, etc. Assn.* 92 Neb. 162, 137 N. W. 1120, 41 L.R.A. (N.S.) 973, Ann. Cas. 1913E, 1127; *Taylor v. Protestant Hospital Assn.* 85 Oh. St. 90, 96 N. E. 1089, 39 L.R.A.(N.S.) 427; *Lindler v. Columbia Hospital*, 98 S. C. 25, 81 S. E. 512. There are a less number which sustain the rule of liability. *Tucker v. Mobile Inf. Assn.* 191 Ala. 572, 68 South. 4, L.R.A. 1915D, 1167; *University of Louisville v. Hammock*, 127 Ky. 564, 106 S. W. 219, 14 L.R.A.(N.S.) 784, 128 Am. St. 355; *Galvin v. Rock Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675; *Gilbert v. Corp. of Trinity House*, L. R. 17 Q. B. Div. 795. See dissenting opinion, *Lindler v. Columbia Hospital*, 98 S. C. 25, 32, 81 S. E. 512.

The precise question is not foreclosed by decisions of this court. We

are free to adopt the rule which seems to us the more just. We respect the precedent of decisions of other states for the light which their reasoning may throw upon the question. In our own opinion the rule of liability seems to us best and we adopt it. Briefly stated, these considerations influence us.

The doctrine of respondeat superior, that is, that a person or corporation shall respond for damages caused by the negligence of one of its employees in the course of his employment, is the rule. It is founded on the doctrine that what one does through another, he does himself. *Morier v. St. Paul, M. & M. Ry. Co.* 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793. In general it is a salutary rule. If exception is to be made, there must appear affirmative ground for the exception.

In *McInerny v. St. Luke's Hospital Assn.* 122 Minn. 10, 141 N. W. 837, 46 L.R.A. (N.S.) 548, and *Maki v. St. Luke's Hospital Assn.* 122 Minn. 444, 142 N. W. 705, this court held that, in an action brought by an employee against a charitable hospital association, for damages for injury caused by contact with machinery not guarded as required by statute, the rule of respondeat superior applies. We do not find any satisfactory ground for distinction between liability for an act or omission which disobeys a statute and one which disobeys a rule of the common law, and it is difficult for us to find any just reason for distinction between liability to an employee and liability to a patient.

One reason given for the rule of nonliability to patients is that, when a person enters a charitable hospital, he enters into a relation which exempts the association from liability for negligence of its servants in ministering to him, or, in other words, he assumes the risk of injury from such negligence. See *Powers v. Mass. Homeopathic Hospital*, 109 Fed. 294, 47 C. C. A. 122, 65 L.R.A. 372; *Bruce v. Central M. E. Church*, 147 Mich. 230, 110 N. W. 951, 10 L.R.A. (N.S.) 74, 11 Ann. Cas. 150; *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453. As a matter of fact, the patient who enters a hospital has no thought of anything of that kind. His thought is that the hospital affords better facilities for caring for him than he has elsewhere at his command, and we see no reason why the assumption of such a risk should be imposed upon him. The same principle would exempt the hospital doctor, yet such exemption is not generally sustained. *DuBois v. Becker*, 130 N. Y. 325, 29 N. E. 313, 14

L.R.A. 429, 27 Am. St. 529; *Burnham v. Stilling*, 76 N. H. 122, 79 Atl. 987; *Peck v. Hutchinson*, 88 Iowa, 320, 55 N. W. 511; *Viita v. Fleming*, 132 Minn. 128, 133, 155 N. W. 1077, L.R.A. 1916D, 644, Ann. Cas. 1917E, 678. Men are not exempt from the consequences of negligence though on a mission of mercy. *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N. Y. Supp. 566.

Another reason given is that, to subject the hospital corporation to liability for negligence of its employees, would authorize the diversion of the funds intrusted to it from the purposes for which they were given. That contention applied with equal force in the *McInerny* case. We disposed of it there adversely to defendant's contention. We do not discuss it further, except to say that the same ground of exemption would exempt hospital corporations for the consequences of negligence in selecting employees. Yet it is generally conceded that they are not so exempt. 5 R. C. L. 378, and cases cited; *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432, 21 Am. Rep. 529. The same ground of exemption would exempt them from liability to third persons for breach of contract or tort. Yet no such exemption is recognized. *Roche v. St. John's Riverside Hospital*, 160 N. Y. Supp. 401; *Basabo v. Salvation Army*, 85 Atl. 120; 5 R. C. L. 378. The same ground of exemption would exempt churches and other corporations maintained by public benefaction, but there is no such exemption. 23 R. C. L. 459; *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 11 Ann. Cas. 150; *Hordern v. Salvation Army*, 199 N. Y. 233, 92 N. E. 626, 32 L.R.A.(N.S.) 62, 139 Am. St. 889; *Davis v. Central Congregational Society*, 129 Mass. 367, 37 Am. Rep. 368.

Another reason urged is that such corporations do not come within the main purpose of the rule of public policy which supports the doctrine of *respondeat superior*, because they derive no gain from the service rendered. This contention does not seem to us a just one. This corporation must administer its functions through agents as any other corporation does. It harms and benefits third parties exactly as they are harmed or benefited by others. To the person injured the loss is the same as though the injury had been sustained in a private hospital for gain. In this case, the deceased paid for the services he expected would be rendered, but this may not be a controlling fact. We do not believe that a policy of

irresponsibility best subserves the beneficent purposes for which the hospital is maintained. We do not approve the public policy, which would require the widow and children of deceased, rather than the corporation, to suffer the loss incurred through the fault of the corporation's employees, or, in other words, which would compel the persons damaged to contribute the amount of their loss to the purposes of even the most worthy corporation. We are of the opinion that public policy does not favor exemption from liability.

Order affirmed.

CHARLES PALYO, AS ADMINISTRATOR OF THE ESTATE OF
NICHOLAS PALYO, DECEASED v. NORTHERN PACIFIC
RAILWAY COMPANY AND ANOTHER.

WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS,
APPELLANT.

SAME v. SAME.

NORTHERN PACIFIC RAILWAY COMPANY, APPELLANT.¹

January 9, 1920.

Nos. 21,530, 21,531.

Dismissal of railway company as defendant.

1. The railway company was not entitled to be dismissed upon bringing in the Director General of Railroads as a defendant.

Railway — fencing statute inapplicable in city street.

2. A six-year old boy got his toes under the wheels of a train which was moved on tracks laid along a public street. The boy and a companion of the same age were standing in the street, when the latter, in a spirit of mischief, threw the former's cap under the train and pushed him under, when he hesitated to rescue the cap. One of the acts of negligence charged against the company was the failure to comply with the statute requiring its right of way to be fenced. It is held that the court erred in charging the jury that this statute was applicable to the locus in quo, and that the burden was on the company to show that public convenience required the right of way kept open.

¹Reported in 175 N. W. 637.

The statute is not applicable to railway tracks maintained under license from the municipality along a street duly dedicated to public travel and which has never been vacated, following *Rippe v. Chicago, M. & St. P. Ry. Co.* 42 Minn. 34.

Judgment notwithstanding.

3. The defendants were not entitled to judgment notwithstanding the verdict.

Action in the district court for Hennepin county to recover \$3,000 for the death of plaintiff's intestate. The answer alleged that the intestate's own negligence caused or contributed to the injuries received by him. The case was tried before Leary, J., who granted the motion to substitute Walker D. Hines, Director General of Railroads, as party defendant in place of the Northern Pacific Railway Company, but denied the motion to dismiss the company therefrom, and a jury which returned a verdict for \$2,000. From orders denying their motions for judgment notwithstanding the verdict or for new trials, Walker D. Hines and the Northern Pacific Railway Company took separate appeals. Order denying judgment affirmed; new trial granted.

Charles Donnelly and D. R. Frost, for appellants.

George R. Smith, H. Stanley Hanson and Leo J. Gleason, for respondent.

HOLT, J.

Action to recover damages for the death of plaintiff's intestate by the wrongful act of defendants. Verdict for plaintiff, and separate appeals by defendants from the order denying their motions in the alternative for judgment or a new trial.

The action, as originally brought, was against the railway company alone. But the company made a motion to substitute in its place Walker D. Hines, Director General of Railroads, and to dismiss as to it. The court granted the motion to the extent of making the director general a party defendant, but refused to dismiss the company. Both defendants challenge the order. We adhere to the decision in *Lavalle v. Northern Pacific Ry. Co.* 143 Minn. 74, 172 N. W. 918, until the question is set at rest by the Supreme Court of the United States. Hence the order refusing to dismiss the railway company must be sustained. As to the director

general, he apparently was willing to become a defendant, and the refusal to dismiss the company cannot prejudice him.

The facts in respect to the situation at and in the vicinity of the accident and what is known as to its occurrence may be thus stated: Lowry avenue runs east and west in the northeast part of Minneapolis and a double track street-car is operated thereon. The next parallel street to the north is Twenty-sixth avenue north. Running north and south, and crossing these two streets, is Main street. The defendant railway company operates its two main tracks and one side track along Main street, occupying the whole street. It also owns the lots, save one, abutting Main street between the avenues mentioned. The track is not fenced. On the corner of Twenty-sixth avenue, and a block west of Main street, is a public grade school attended by some 900 pupils. Most of the pupils live to the southeast of the school and across these railroad tracks. In going to and from school those who lived to the southeast, instead of walking along the street passing the school from or to Lowry avenue, went in a southeasterly direction crossing the railroad tracks a few feet north of Lowry avenue. A well-worn path indicated where the main travel was.

Plaintiff's intestate, a boy about six years, called Nicky, was a pupil at this school and his home was east of the tracks. His class was dismissed shortly after two o'clock in the afternoon of March 19, 1918. Nothing further is known of his whereabouts, until about an hour later, when he and another small boy were seen, by two eleven-year old school girls, standing west of and near to the railway tracks. A string of some 14 cars had shortly before been placed some little distance north of the path mentioned on the side track, the most westerly of the three tracks, and then an engine with some ten cars had pulled south across Lowry avenue and was backing north to couple onto the 14 cars. The train crew worked on the east side of the train and did not observe the boys, at least not in close proximity to danger, until after Nicky was hurt. The girls, after they first noticed the boys, seemed to have stopped a few moments to play, and did not again look toward the train till it had moved south and the last car had passed or was passing Nicky. They were then so near that they recognized him and noticed that he was bending over crying and looking at his foot, holding his cap in his left hand. He was close to the side track, in fact they say it appeared as if he jumped up from under

the train. The other boy was then seen a short distance north, running away. When the girls asked Nicky what the matter was he said, pointing to the boy running: "The boy threw his cap under the train and pushed him under it so he would go and get it. That he did not want to go in under." A car-wheel had evidently passed over the toes of Nicky's foot. The injury proved fatal on March 28.

The negligence complained of was failure to fence, starting the train without giving warning, and not taking due care to avoid injuring children of tender years whom defendant knew were, with its acquiescence, then crossing or attempting to cross the track.

Error is assigned on the court's instruction that, under section 4263, G. S. 1913, the railway company was in duty bound to maintain fences along its tracks, unless public convenience required this portion of the road to be kept open, and when it was shown that no fences were here maintained it devolved on the company, in order to escape the charge of negligence, to show that public convenience required it to be kept open. We think the fencing statute not applicable to the locus in quo. Main street is a public street. It has never been vacated. The railway company has a mere license to there maintain tracks and move its cars, but the public retains the right to such use thereof for travel as its occupation by the company makes feasible. It is clear that the company may not cut off access to the street of the person who owns the one abutting lot. And the lots owned by the company may at any time be disposed of, in which event the owners could undoubtedly claim access to the street. *Rippe v. Chicago, M. & St. P. Ry. Co.* 42 Minn. 34, 43 N. W. 652, is clearly in point to the effect that the section mentioned does not here apply. See also *Greeley v. St. Paul, M. & M. Ry. Co.* 33 Minn. 136, 22 N. W. 179, 53 Am. Rep. 16; *Marengo v. Great Northern Ry. Co.* 84 Minn. 397, 87 N. W. 1117, 87 Am. St. 369; 2 Thompson, Com. on Law of Negligence, § 2073. What is said in the *Marengo* case about the company's obligation to fence its right of way between platted and unopened streets refers to streets crossing tracks, not to tracks laid along a street. For this error there must be a new trial.

A majority of the court are of the opinion that defendants are not entitled to judgment notwithstanding. Although the boys were standing in a public street where they, so far as concerns the railway company, had a

right to be, still it was a question for the jury to what extent the company should have gone, in view of the dangers connected with the operation of cars along a public street, to divert travel therefrom, at least so far as school children are concerned. From the fact that so many children, some of them very young, cut across the company's premises and onto the tracks at no regular street crossing, the jury might well find that it was negligence not to place barriers between the property it owned and Main street. Had such barriers been kept, it is not likely that either these boys or other children from the school mentioned would have attempted to go upon Main street at other places than the regular street intersections. So that, although the fencing statute is inapplicable, it yet remains for the jury to say whether the situation is not such that a duty arose to make reasonable efforts to bar the short cut over the company's premises by fences or other obstructions. The accident happened about the time the school let out and the children would be apt to come in numbers along the path across defendant's premises and across the tracks. Those in charge of the train in question knew that such was the fact. Under such circumstances it became a question for the jury whether the train crew took the proper precaution to prevent harm to these children, who could not be regarded as trespassers, at least not as they came upon the street exposed to the dangers incident to the operation of trains on the tracks laid therein.

Of course, even though the push of Nicky's companion must be regarded as a proximate cause of the injury, it was for the jury to say whether it was the sole cause. "As a general rule it may be said that negligence to render a person liable need not be the sole cause of an injury. It is sufficient that his negligence concurring with one or more efficient causes, other than plaintiff's fault, is the proximate cause of the injury. So that where two causes combine to produce injuries a person is not relieved from liability because he is responsible for only one of them." 29 Cyc. 496, 497; *Griggs v. Fleckenstein*, 14 Minn. 62 (81), 100 Am. Dec. 199; *Vills v. City of Cloquet*, 119 Minn. 277, 138 N. W. 33; *Fairchild v. Fleming*, 125 Minn. 431, 147 N. W. 434.

The order so far as it denies judgment is affirmed, but insofar as it denies a new trial it is reversed and a new trial granted.

J. J. BENNING AND ANOTHER v. MARCUS A. HESSLER.¹

January 9, 1920.

No. 21,532.

Judgment by confession — homestead exemption.

A statement in a confession of judgment, upon a promissory note given for borrowed money, waiving defendant's right and benefit of the law exempting property from sale on execution, does not subject defendant's homestead to levy under execution issued upon such judgment.

Action in the district court for Clay county to annul the stipulations contained in a confession of judgment and that the sale of a homestead thereunder be declared to be contrary to public policy and void. The case was tried before Fesler, J., who made findings and as conclusions of law found that the sale and sheriff's certificate of sale were null and void. From an order denying his motion for amended findings or for a new trial, defendant appealed. Affirmed.

Christian G. Dosland and James A. Garrity, for appellant.

James M. Witherow, for respondents.

QUINN, J.

On November 2, 1917, defendant obtained judgment against the plaintiffs, by confession, upon two promissory notes which he held against them. The judgment and execution issued thereon contain the following statements:

"We, Rose A. Benning and J. J. Benning, both of the city of Moorhead, Clay County, Minnesota, hereby confess ourselves indebted to Marcus A. Hessler of the city of Moorhead, Clay County, Minnesota, in the sum of one thousand two hundred nine and 5/100 (\$1,209.05) dollars and authorize the clerk of the District Court in and for the said County of Clay to enter judgment against us and each of us and in favor of Marcus A. Hessler for the sum of \$1,209.06.

"We further waive the right and benefit of any law of this or any other

¹Reported in 175 N. W. 682.

state exempting property, real or personal, from sale on judgment execution."

The defendant procured an execution upon such judgment and placed it in the hands of the sheriff, who levied upon the east two-thirds of lots 4 and 5 of block 58 of the city of Moorhead, which the plaintiffs then occupied as their homestead. Such proceedings were thereafter had that the sheriff sold said homestead under such execution and on January 5, 1918, issued a certificate of sale thereof to the defendant for \$1,246.86, the amount of such judgment and costs, which certificate was recorded in the office of the register of deeds of the county on January 9, 1918, at page 391 of book 74 of deeds.

It is alleged in the complaint that the premises in question were the homestead of plaintiffs; that defendant's attorney induced them to sign a confession of judgment containing a statement waiving, in form, all rights of exemption held by them; that on the same day defendant caused judgment to be entered, execution to issue and a levy thereunder to be made upon the homestead of plaintiffs, and a sale thereof to be had under such execution and a sheriff's certificate of sale to issue to him therefor. The complaint also contains a prayer that the statement of waiver in the confession of judgment be annulled and that the sale be declared void and of no effect. The answer admits that the defendant procured the confession of judgment containing the waiver clause, for the purpose of protecting defendant, and to secure a judgment which would be a lien upon plaintiffs' homestead, and admits the levy, sale and issuance and recording of the sheriff's certificate of sale upon such judgment. At the trial the complaint was amended, under objection, as to certain claims of fraud with reference to the procuring of the confession of judgment, and thereafter defendant objected to the reception of any evidence thereunder because of the insufficiency of the pleading. As stated by the learned trial judge, we are unable to see how defendant's rights could be prejudiced thereby, as the decision upon that issue was in favor of the defendant. Stripped of all early history, the pleadings, when considered as a whole, may be said to contain but one question for consideration, and that is: Whether the confession of judgment was such as to subject the homestead to levy under the execution for this particular debt.

Under section 6957, G. S. 1913, the homestead of a debtor and his

family is exempt from seizure and sale under legal process on account of any debt not lawfully charged thereon in writing. Does the confession of judgment charge this debt on the property sold? We think not. The waiver contained in the confession binds no specific property. It does not purport to be a charge upon property. It is in terms but a waiver. It describes nothing and creates a lien upon nothing. It cannot be said that the debt sued upon is a charge in writing on the premises in question. It does not subject the homestead to a levy under the execution.

Affirmed.

STATE v. M. J. GOLDSTONE.¹

January 9, 1920.

No. 21,560.

Criminal law — evidence of guilt.

1. Defendant, driving an automobile on a public highway, struck a pedestrian. The evidence is sufficient to establish that defendant was guilty of culpable negligence, and that the pedestrian was injured thereby.

Same — proximate cause of death.

2. The evidence that the pedestrian was previously in good physical condition, that he was knocked down and run over, was picked up unconscious, and died in a few hours, is sufficient to establish that the contact with the car caused his death. No expert testimony is necessary.

Same — proof required.

3. It is not necessary for the state to prove every allegation in the indictment, if it prove enough to establish a crime alleged.

Speed law valid.

4. Section 2635, G. S. 1913, making it a penal offense to drive a motor vehicle, at a speed greater than is reasonable and proper having regard to the traffic, or so as to endanger life, limb or property, is not void for indefiniteness and it is valid.

Manslaughter in second degree — violation of speed law.

5. It is the infliction of death by culpable negligence that constitutes manslaughter in the second degree under subdivision 3, section

¹Reported in 175 N. W. 892.

8612, of our statutes. Disobedience of section 2635 may constitute culpable negligence.

Refusal to charge jury.

6. It was not error to refuse to instruct the jury that negligence to be punishable criminally must be foolhardy.

Danger from automobile — charge to jury.

7. An automobile is not to be classed with dangerous agencies like dynamite, and cannot be regarded as dangerous per se so as to render its owner liable on that ground alone for injuries resulting from its use, but the use of an automobile is fraught with more danger than the use of some other vehicles, and there is no objection to language in the charge to the jury calling attention to that fact.

Defendant was indicted by the grand jury of Norman county charged with the crime of manslaughter in the second degree, tried in the district court for that county before Grindeland, J., and a jury which found him guilty as charged in the indictment. Defendant's motion for a new trial was denied. From the judgment of conviction, sentencing him to the penitentiary, defendant appealed. Affirmed.

E. Engerud and Morphy, Bradford & Cummins, for appellant.

Clifford L. Hilton, Attorney General, James E. Markham, Assistant Attorney General, and M. A. Brattland, County Attorney, for respondent.

HALLAM, J.

1. Defendant was convicted of manslaughter in the second degree. While driving an automobile on a public highway, he ran over and killed Jacob Kjolvig. The way was unobstructed. Kjolvig was in plain sight. He was on foot and traveling north. Meeting a friend driving south with a team and wagon, he stopped to talk. The two stood on the west side of the road. As Kjolvig started on his way again, he crossed to the east side of the road. Just at this time, defendant was approaching from the north. He turned to the east side of the road in order to pass the standing wagon. Apparently Kjolvig did not see defendant until defendant was close upon him. There is evidence that each then tried to dodge the other and Kjolvig was struck. There is evidence that defendant was driving at a reckless rate of speed under the conditions there ex-

isting. Witnesses place the speed at 35 miles an hour. There is some testimony that the automobile went eight rods after striking deceased. The indictment was brought under subdivision 3, section 8612, G. S. 1913, which provides that homicide is manslaughter in the second degree when committed without a design to effect death, "by any act, procurement, or culpable negligence of any person, which, according to the provisions of this chapter, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree." The evidence is sufficient to establish that defendant was guilty of culpable negligence and that the injury to Kjelvig resulted therefrom.

2. Defendant contends that there is no evidence to support the claim that the contact with defendant's automobile was the cause of Kjelvig's death. We think there is. There is no expert testimony to that effect, but this is not indispensable. Kjelvig was in good physical condition. He was knocked down and dragged and the wheels of the automobile passed over his abdomen; he was picked up unconscious and died in a few hours. From these facts the jury might infer that the contact with the car caused his death. Wharton, Homicide, pages 45, 46, 898; State v. Schreiber, 111 Minn. 138, 126 N. W. 536; Perovich v. United States, 205 U. S. 86, 27 Sup. Ct. 456, 51 L. ed. 722; Edwards v. State, 39 Fla. 753; Lemons v. State, 97 Tenn. 560, 37 S. W. 552; Loew v. State, 60 Wis. 559, 19 N. W. 437.

3. The indictment charged that:

The defendant did "wilfully, wrongfully and feloniously drive and propel said automobile along said highway, in an unlawful, negligent and culpably reckless manner and at a rate of speed exceeding twenty-five miles an hour for a distance of one-quarter mile, and then and thereby driving said automobile upon and over the body and person of said Jacob Kjelvig, inflicting upon said Jacob Kjelvig certain mortal wounds and injuries of which said wounds and injuries the said Jacob Kjelvig thereafter died."

The indictment follows in general the language of section 2635, G. S. 1913, which reads as follows:

"No person shall drive a motor vehicle upon any public highway of this state at a speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb

or injure the property of any person. * * * If the rate of speed of any motor vehicle operated on any public highway in this state, outside the closely built up business portions, and the residence portions of any incorporated city, town or village, exceeds twenty-five (25) miles an hour for a distance of one-quarter of a mile, such rates of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the way, or so as to endanger the life or limb or injure the property of any person."

The only claim of negligence was in respect to the speed with which defendant drove his car, though it is not clear that it might not have been broader.

It was not necessary that the state prove every allegation in the indictment, if it prove enough to establish a crime alleged. It was not necessary to prove that the rate of speed had exceeded 25 miles an hour for one-quarter of a mile, if the evidence was sufficient to otherwise prove culpable negligence. Section 2635 makes the driving of a motor vehicle at this particular speed for this particular distance, prima facie evidence of an unlawful rate of speed. But the real prohibition under section 2635 is the driving of a motor vehicle upon a public highway at a speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb or injure the property of any person.

4. Defendant contends that the provisions of section 2635, other than this specific provision as to speed of 25 miles an hour for one-quarter of a mile, are so general in terms as to be unenforceable and void. We have no doubt of the validity of section 2635. A statute making it a penal offense to drive a motor vehicle on a public highway "at a speed greater than reasonable and proper, having regard to the traffic and use of the way, or so as to endanger the life or limb or injure the property of any person," is in our opinion sufficiently definite and is a valid statute. The opinion to the contrary expressed in *Hayes v. State*, 11 Ga. App. 371, 75 S. E. 523, appears to us to be unsound and we decline to follow it.

5. We do not wish to be understood as saying that the guilt or innocence of defendant depends upon section 2635. It does not. Under subdivision 3 of section 8612, it is the infliction of death by culpable neg-

ligence that constitutes the crime of manslaughter in the second degree. Yet disobedience of section 2635 may constitute culpable negligence, and the court properly read section 8635 to the jury, and properly charged them that, if, at the time the automobile struck Kjelvig, defendant was driving at a speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger life or limb or property, and that the death of Kjelvig was a direct and natural result of the reckless and gross negligence of defendant, then they should find defendant guilty, and that if all the circumstances established a degree of carelessness amounting in itself to a culpable disregard of the rights and safety of others they established criminal negligence.

6. We think the court sufficiently defined manslaughter in the second degree. It was not error to refuse to charge that negligence to be punishable criminally must be "foolhardy." That term is sometimes used in defining culpable or criminal negligence, *State v. Lester*, 127 Minn. 282, 285, 149 N. W. 297, L.R.A. 1915D, 201, but it is not an indispensable word in the definition. The court's definition was sufficient.

The court, in charging the jury, after referring to the mutual rights of automobile drivers, buggy drivers and pedestrians, said: "Wherever any man uses a dangerous machine, he must guard the exercise of that right with a proper care and due regard for the lives and safety of people who have an equal right to be upon the * * * highways." We see nothing objectionable in this. The rule of the cases cited by defendant's counsel, that an automobile is not "to be classed with such dangerous agencies as dynamite or savage animals," and cannot be regarded as dangerous per se so as to render its owner liable on that ground alone for injury resulting from its use, *Parker v. Wilson*, 179 Ala. 361, 370, 60 South. 150, 43 L.R.A.(N.S.) 87, and *Steffen v. McNaughton*, 142 Wis. 49, 124 N. W. 1016, 26 L.R.A.(N.S.) 382, 19 Ann. Cas. 1227, has no application here. See *Allen v. Johnson*, supra, page 333, 175 N. W. 545. But the use of an automobile is fraught with more danger than the use of some other vehicles and we can see no harm in calling attention to that fact.

Other errors assigned have been carefully examined. In our opinion they present no reversible error and require no special comment.

Judgment affirmed.

STATE BANK OF ROGERS v. FRANCIS A. MISSIA.¹

January 9, 1920.

No. 21,585.

Fraud in obtaining promissory note — burden of proof on holder.

1. The title of the one who negotiated the promissory notes in suit was defective, within the meaning of section 5867, G. S. 1913, and cast the burden of proof upon plaintiff that it was an innocent holder in due course.

Finding of bad faith sustained by evidence.

2. The evidence sustains the findings to the effect that plaintiff took the notes in bad faith, because of failure to make inquiries called for by the circumstances surrounding the transaction.

Conclusions supported by the findings.

3. The conclusions of law accord with the findings of fact.

Action in the district court for Ramsey county to recover \$1,400 on two promissory notes. The facts are stated in the opinion. The case was tried before Brill, J., who made findings and as conclusion of law found that plaintiff was chargeable with notice of the rights of defendant, acted in bad faith, and that plaintiff was not entitled to recover upon the notes. From the judgment in favor of defendant, plaintiff appealed. Affirmed.

Cobb, Wheelwright & Dille and *John C. Benson*, for appellant.

Moritz Heim and *Thomas D. O'Brien*, for respondent.

HOLT, J.

Plaintiff appeals from a judgment rendered for defendant. F. A. Horstman and H. M. Heuring were, during July and August, 1912, the president and assistant cashier respectively of plaintiff, a state bank. The court found that on July 31, 1912, Horstman, with intent to defraud defendant, represented that he was the owner of certain land in Florida, and, if defendant would sign a contract for its purchase, Horstman would

¹Reported in 175 N. W. 614.

resell it in one year at a profit. Defendant thereupon executed a contract to buy, paid \$200 cash and signed two notes for \$700 each, but therein no payee was named, the space being blank, and the space was also blank where the amount of the interest is usually inserted, and it was agreed between them that Horstman should hold the notes in the condition they were then in, without filling said blanks, until title to said land would be vested in defendant. In case the title did not vest in defendant, it was agreed that the cash paid and the notes were to be returned to him. Horstman did not own the land and never acquired any right thereto. On August 14, 1912, without defendant's knowledge or consent, Horstman wrote in plaintiff's name as payee and inserted interest of 7 per cent in one and 4 per cent in the other of the notes, and turned them over to Heuring in payment of moneys that, during ten days preceding, Horstman, as president of the bank, had collected from various persons indebted to it. Heuring thereupon credited the accounts of said persons with the money collected and paid the balance in cash to Horstman. That Heuring knew that the two notes were not received by Horstman in payment or on account of any indebtedness to the plaintiff, or as a part of the collections made by Horstman, and that in taking said notes Heuring and plaintiff acted in bad faith.

We have examined the evidence and find ample support for the findings that Horstman procured the notes through fraud, that he had no authority to fill the blanks therein, and that they were negotiated in breach of faith.

There is no quarrel with appellant's law that an innocent holder, in due course, of negotiable paper has nothing to fear from the fact that, when it left the maker's hands, it had blank spaces which have been filled contrary to instruction and that it has been put in circulation without authority. If plaintiff is a holder in due course there is no defense.

Hence the appeal must turn upon whether the evidence sustains the findings to the effect that plaintiff was not an innocent purchaser in good faith for value and without notice. In determining this it must be remembered that the title of Horstman to the notes was defective within the meaning of section 5867, G. S. 1913. He obtained them by fraud and negotiated them in breach of faith, so that the burden was on plaintiff to prove that it was a holder in due course. Section 5871, G. S. 1913.

We think the evidence supports the findings to the effect that plaintiff took the notes in bad faith and had notice of the defect in Horstman's title to them.

Heuring knew that the notes were not received in the course of the collections Horstman had made for the bank. He also knew that defendant had had no transaction with the bank which could have involved the giving of these notes. How then did the notes come to name the bank as payee? And how did Horstman come to use them as cash for the money he had collected for the bank? Satisfactory answers to these questions must have suggested themselves as quite important to Heuring before he could venture to take the notes. "To establish good faith there must not only be an absence of knowledge of any invalidity, but an absence of circumstances which would put an ordinarily prudent man upon inquiry. If there are such circumstances, and he makes no attempt to ascertain the truth, he cannot claim good faith in accepting the instrument." *Pennington County Bank v. First State Bank of Moorhead*, 110 Minn. 263, 125 N. W. 119, 26 L.R.A.(N.S.) 849, 136 Am. St. 496. Heuring made no inquiry, and, reading between the lines of his testimony, the inference is that the president's wish was law to the assistant cashier.

The findings of fact require the conclusion of law that plaintiff take nothing. In addition to the evidentiary finding concerning Heuring's knowledge that the notes were not the proceeds of the collections made for the bank, the court found as a fact that they were taken in bad faith by plaintiff. The evidence warrants an inference of bad faith, because, although the transaction between the bank officers was unusual and the form of the notes to Heuring's knowledge did not represent the truth, namely, that defendant had for value executed them to plaintiff, Heuring made no inquiry.

The judgment is affirmed.

STATE V. PAULINE NANICK.¹

January 9, 1920.

No 21,662.

Criminal law — keeping a disorderly house.

1. To constitute the offense of keeping a disorderly house it must appear that disorderly acts are habitually permitted on the premises or that the house is kept as a place to which people may and do resort for the purpose of indulging in immoral or unlawful practices.

Same — conviction sustained.

2. The finding that defendant was guilty of the offense of keeping a disorderly house is sustained by the evidence.

From the judgment of the municipal court of Minneapolis, Montgomery, J., convicting her of the offense of keeping a disorderly house, defendant appealed. Affirmed.

A. M. Cary, for appellant.

C. D. Gould, City Attorney, *John T. O'Donnell* and *Thomas B. Kilbride*, Assistant City Attorneys, for respondents.

TAYLOR, C.

Defendant appeals from a judgment of the municipal court of the city of Minneapolis convicting her of the offense of keeping a disorderly house.

Whether the evidence is sufficient to sustain the conviction is the only question for consideration. The prosecution presented the testimony of two men who were found in the place and of two policemen who made the arrest, one of whom had previously visited the place as a detective. The defendant offered no evidence whatever.

Defendant contends that the evidence does not warrant the conclusion that she was the keeper of the house, nor the conclusion that the disorderly acts had been repeated to such an extent as to constitute the place a disorderly house within the meaning of the penal laws.

¹Reported in 175 N. W. 693.

It appears from the testimony that defendant was in the building at all the times mentioned and that she told the officer who made the arrest that she was "running the place." This was contradicted in no way and was sufficient to sustain the finding that she was the keeper.

It is true, as contended by defendant, that the commission of single or isolated disorderly or immoral acts on the premises does not constitute the place a disorderly house within the meaning of the penal laws. To establish the offense of keeping a disorderly house, it must appear that acts injurious or offensive to the public are habitually permitted on the premises, or that the house is conducted as a place to which people may and do resort for the purpose of indulging in immoral or unlawful practices. But it is sufficient if, when the character of the culpable acts and the circumstances under which they were committed is taken into account, it appears that they were repeated often enough or were continued long enough to warrant an inference that the house was kept for the indulgence of such practices.

It appears without contradiction that on two occasions on the day of the arrest, in defendant's presence, a girl in the place solicited men to go upstairs and have intercourse with her for a stated price, that when the officers made the arrest this girl was found upstairs in a bedroom with one of these men who was partially undressed, and that, two days prior to the arrest, in the presence of defendant and another woman, this girl had made similar proposals to several men who were then in the place. The building was apparently occupied only by these women who kept a small stock of cigars and pop for sale. The proposals testified to were made by the girl at the counter. Some if not all of them were made to entire strangers who entered the place to make purchases. In the absence of any contradiction or explanation, we are of opinion that the facts testified to justified the court in concluding that defendant was keeping a disorderly house.

Judgment affirmed.

A. GUSTAFSON v. WALTER F. RHINOW, AS ADJUTANT GENERAL OF THE STATE OF MINNESOTA AND OTHERS.¹

January 9, 1920.

No. 21,725.

Constitution — Soldiers' Bonus Law valid.

1. Under section 7 of article 9 of the Constitution there is no limitation of the amount of debt which may be contracted by the state "in time of war, to repel invasion or suppress insurrection." The act of September 22, 1919 (Laws 1919, Ex. Sess. c. 49), appropriating \$20,000,000 for the payment of additional compensation to those serving in the forces of the United States in the war with Germany is authorized by said section and is constitutional, and the debt created by the act is a direct obligation of the state.

Same — debt for a public purpose.

2. The debt created by the act is for a public purpose.

Soldiers of allied armies not beneficiaries.

3. The act does not include among its beneficiaries residents of Minnesota enlisted in the associated forces, but not enlisted in the forces of the United States.

Action in the district court for Hennepin county to restrain the members of The Soldiers' Bonus Board from carrying out the provisions of Laws 1919 (Ex. Sess.) c. 49. The demurrer of the defendants to the complaint was sustained, Jelley, J. From the order sustaining the demurrer, plaintiff appealed. Affirmed.

Chief Justice Brown, Justice Holt and Justice Quinn being disqualified from sitting in this case, the Governor, pursuant to Const. art. 6, § 3, assigned Judge McClenahan, of the Fifteenth judicial district, Judge Catherwood, of the Tenth judicial district, and Judge Dancer, of the Eleventh judicial district, to sit in their places. The case was argued before Hallam, Dibell, McClenahan, Catherwood and Dancer, JJ.

¹Reported in 175 N. W. 903.

George T. Simpson and John F. Dahl, for appellant.

Clifford L. Hilton, Attorney General, *Albert F. Pratt*, *Montreville, J. Brown* and *Egbert S. Oakley*, Assistant Attorneys General, for respondent.

Frederick D. McCarthy, *William D. Mitchell*, *E. E. Watson*, *Orrin E. Safford* and *LeRoy Bowen*, for the American Legion, filed a brief as amici curiae.

MCCLENAHAN, J.

1. This action is brought by a qualified person for the purpose of permanently restraining the defendants from carrying out the provisions of Laws 1919 (Ex. Sess.) p. 72, c. 49, known as the 'Soldiers' Bonus Law. The attorney general, appearing for the defendants, interposed a general demurrer to the complaint. The demurrer was sustained by the trial judge and plaintiff appealed.

The real question to be determined is the constitutionality of the bonus law mentioned. Section 1 of that law defines the word "soldier," as used in the act, and the situation seems to require its quotation here in full. It reads:

Section 1. Definition.—That the word "soldier" as used in this act, shall mean any officer, soldier, sailor, marine or nurse who has been or is a part of the military or naval forces of the United States or of any nation associated with the United States in the war with Germany and who was a resident of the state of Minnesota at the time he was commissioned, enlisted, inducted, appointed or mustered into the military or naval service of the United States, and who has been or may be given an honorable or ordinary discharge or release from such service; provided, however, that the word "soldier," as used in this act, shall not be construed to mean, and shall not include any person who, at any time during the period of the war with Germany, sought so avoid service because of conscientious objections thereto, or because of alienage or who has been, at any time, guilty of fraud or violation or evasion of the Selective Service Act or of the rules or regulations of the War Department in force thereunder.

Section 2 provides that such soldier shall be entitled to receive from the state, out of a fund created by the act and called "The Soldier Bonus

Fund," the sum of fifteen dollars (\$15) for each month or fraction of month of military or naval service as such soldier, after April 6, 1917, and prior to the date when peace shall be agreed upon between the United States and the German government. The minimum amount so to be received is fixed at fifty dollars (\$50). This section contains other provisions not here material.

Section 3 requires the soldier to file his application for the benefits of the act with the clerk of the district court of the county in which he resides, or in which he resided at the time of his induction into the service, or with the adjutant general who is required to provide forms for such application.

Section 4 creates "The Soldiers' Bonus Board," to consist of the state auditor, the state treasurer, and the adjutant general, who are the defendants in this action. It is the duty of this board, among others, to examine into the applications filed, and make any other examination necessary to establish facts and to approve or disapprove such applications.

Section 5 authorizes the bonus board to issue and sell certificates of indebtedness to make funds available for carrying out the provisions of the act, and requires the proceeds of such sales to be paid into the bonus fund. These certificates are to aggregate twenty million dollars (\$20,000,000), and they, as well as the interest upon them, are to be paid out of the bonus fund. Any money remaining in that fund after such payments is to be credited to the state revenue fund.

Section 6 appropriates the sum of twenty million dollars (\$20,000,000), or as much thereof as may be necessary, out of the bonus fund for carrying out the provisions of the act.

Section 7 authorizes and directs the state auditor to levy and collect, as are other state taxes, for the year 1919, and for each of the nine succeeding years, a sum not exceeding two million dollars (\$2,000,000) per year for the purpose of providing funds to pay such certificates as they mature and the interest thereon, and also to levy and collect such additional sums as may be needed to pay the interest upon them. All of which shall be placed in the bonus fund.

Section 8 relates to employees, their compensation and other details of administration.

Section 9 provides for paying the widow of a deceased soldier, if she has not remarried, the amount such decedent would have received under the act had he lived.

While sections 1, 5, 6, 7, 8 and 9, of article 9 of the Constitution are claimed to be violated by this statute, or expressly to prohibit its enactment, it does not seem necessary especially to consider any of those except sections 5, 6 and 7.

Section 5 authorizes a public debt to be contracted for the purpose of defraying extraordinary expenditures, but limits the aggregate of such debts to the sum of two hundred fifty thousand dollars (\$250,000), and section 6 requires that the debts so authorized shall be contracted by a loan on state bonds.

Section 7 of article 9 of the Constitution declares that "the state shall never contract any public debt, unless in time of war, to repel invasion or suppress insurrection, except in the cases and in the manner provided in the fifth and sixth sections of this article." No limitation is imposed upon the amount of debt that may be contracted for the purposes contemplated by section 7 of article 9, nor is the evidence of such a debt restricted to any particular form. It seems to have been the purpose of the organic law to liberalize the application of this section, in view of the vital character of the emergency it was designed to provide against. But such emergency is not to be considered the mere repelling of invasion or suppressing of insurrection in time of war, as we understand the appellant to contend. A public debt for a proper military purpose may be legally contracted in time of war, without reference to a state of invasion or insurrection. Conditions may exist, as recent history has shown, which call for active military operations of various kinds, though no hostile invasion be imminent or even probable. Such operations might require the borrowing of large sums of money, the amount of which would be dependent upon the existing circumstances and could not, in the nature of things, be determined or limited in advance.

Franklin v. State Board of Examiners, 23 Cal. 173, is directly in point. The constitution of California limited the state debt to \$300,000 "except in case of war, to repel invasion or suppress insurrection," etc. By an act of April 27, 1863, entitled "An act for the relief of the enlisted men of the California Volunteers in the service of the United

States" the legislature provided for the creation of a debt of \$600,000 to be used in the payment of an additional \$5 per month to enlisted men of the California Volunteers from the time of their entry into the service. The plaintiff entered service on November 25, 1861, and was discharged on July 25, 1863. The question was upon the constitutionality of the statute giving him \$5 per month for the period of his service, and the statute was held authorized under the provision of the California constitution identical for practical purposes with section 7 of article 9 of our Constitution. This case is not distinguishable from the one before us. See also *People v. Pacheco*, 27 Cal. 175; *Reis v. State*, 133 Cal. 593, 65 Pac. 1102; *State v. Stewart*, 54 Mont. 504, 171 Pac. 755, Ann. Cas. 1918D, 1101.

We hold that the legislation in question is authorized by section 7 of article 9 of the Constitution of Minnesota, and that the debt so provided for will be the direct obligation of the state.

It is not to be inferred, however, that section 7 authorizes the incurring of a public debt, in time of war, for all purposes. The debt must be for a public purpose, as a matter of course, but it also must be for a purpose having some reasonable connection with the conduct, offensive or defensive, of the war in question; it must be for some legitimate military or naval purpose pertaining to the existing state of war. Any other interpretation would invite serious excesses.

That a state of war existed at the time of the passage of the act here involved needs no discussion, in view of the recent decisions of the Supreme Court of the United States sustaining the validity of the War Prohibition Act. *Hamilton v. Kentucky Distilleries & Wareh. Co.* 251 U. S. 146, 40 Sup. Ct. 106, 64 L. ed. —; *Dryfoos v. Edwards*, 251 U. S. 146, 40 Sup. Ct. 106, 64 L. ed. —.

The appellant urges that the legislation in question is not within the powers granted by the Constitution, because the beneficiaries, or a large proportion of them, were soldiers of the United States; that even the national guard units finally became federalized and lost their identity as state troops; that, under such circumstances, the state of Minnesota is under no legal or moral obligation to them such as will support the taxation provided for in this act. With this construction we do not agree. It is true that the Federal government alone has power to declare war,

but having done so, the government and people of Minnesota became bound to defend and support the national government. While the states of the nation are sovereign in a certain field, they are also members of the family of states constituting the national organization. *City of Lowell v. Oliver*, 8 Allen, 247; *Opinion of the Justices*, 211 Mass. 608, 98 N. E. 338; *State v. Handlin*, 38 S. D. 550, 162 N. W. 379; *Trustees of Cass Township v. Dillon*, 16 Oh. St. 38, 43. If Minnesota may properly give the lives of her sons in support of the nation, the withholding of the money of her people from such support would seem to be justifiable only by the clearest constitutional inhibition.

2. Taxes can be levied for public purposes only, and if the taxation provided for in the act we are now considering be not for a public purpose, it cannot be upheld. Constitution, article 9, section 1; 3 Dunnell, Minn. Dig. § 9119. The question whether a tax be for a public purpose or a private purpose is one of fact and proper for judicial ascertainment, but the question of governmental policy involved in a statute imposing a tax is a matter for legislative determination. Any doubt as to whether the purpose be public or private must be resolved in favor of the constitutionality of the law. To justify a court in declaring a tax invalid, on the ground that it was not imposed for the benefit of the public, the absence of a public interest in the purpose for which the money is raised by taxation must be so clear and palpable as to be immediately perceptible to every mind. *City of Minneapolis v. Janney*, 86 Minn. 111, 90 N. W. 312; *Woodall v. Darst*, 71 W. Va. 350, 77 S. E. 264, 80 S. E. 367, 44 L.R.A. (N.S.) 83, Ann. Cas. 1914B, 1278; *Town of Bennington v. Park*, 50 Vt. 178; *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Speer v. School Directors*, 50 Pa. 150; *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *Booth v. Town of Woodbury*, 32 Conn. 118.

Had this so-called Soldiers' Bonus Law been passed prior to the induction of its proposed beneficiaries into the service, its validity could hardly be questioned. In *Comer v. Folsom*, 13 Minn. 205 (219), this court held that it was competent for the legislature to give gratuities to those drafted into or voluntarily entering the military service of the United States, or to their families. See also *Wilson v. Buckman*, 13 Minn. 404 (441). Assuming that chapter 8 (Ex. Sess. 1862), and chap-

ter 11, Laws 1864, which were under consideration in the Comer case, related only to bounties that had been offered prior to entry into and as an inducement to enter the service, the cases therein cited in support of the rule the court announced recognized the propriety of rewarding past as well as future services. In *City of Lowell v. Oliver*, supra, the court said:

"We can see no valid distinction in principle between a right to raise money for a specific object yet to be accomplished, and a right to raise it to defray the expense of the same object after it has been attained."

The constitution of Massachusetts at that time granted, as the opinion states, full power and authority "to impose and levy proportional and reasonable * * * taxes upon all the inhabitants of, and persons resident and estates lying within the commonwealth; * * * for the public service, in the necessary defense and support of the government of the said commonwealth, and the protection and preservation of the subjects thereof." The action in the *City of Lowell* case was to recover from the treasurer of the state moneys advanced by that city in aid of families of persons, inhabitants of Lowell, who had enlisted in the military service of the United States, such advances having been made under several acts of the legislature.

Freeland v. Hastings, 10 Allen, 570, also cited in the Comer case, held that it was competent for the legislature to appropriate money and levy a tax for the purpose of paying bounties to persons who had volunteered, or might volunteer, to enlist as soldiers in the armies of the United States, raised under orders of the Federal government to aid in suppressing the rebellion. The tax there raised was for the purpose of refunding sums which had been contributed by individuals into a common fund for the general purpose of filling quotas of troops made under calls of the President during the Civil War.

The supreme judicial court of Massachusetts, in 1912 (*The Opinion of the Justices*, supra), answered in the affirmative the question whether it was within the power of the legislature to authorize the payment as a testimonial for meritorious service sums of money to certain veterans of the Civil War, if the legislature was of the opinion that the payment of such gratuities to such persons in recognition of the sacrifices which they made and the motives which prompted them to enlist, would tend to en-

courage the spirit of loyalty and patriotism and so to promote the public good by affording visible evidence that if hereafter there should be a call for men the commonwealth would not forget those who should volunteer, and added that "a gift of money has in it an element of private benefit which does not pertain to the erection of a statue or a monument which all may see, or even to the gift of a medal or other badge of honor which may be handed down as an object of just pride to the donee's descendants. But, as in the case of pensions, it always has been recognized as one of the ways in which meritorious service may be rewarded. * * * Whether, taking all of the circumstances into account, the proposed legislation will be expedient, and whether gratuities such as it is proposed to give will tend to promote the public good by encouraging the spirit of loyalty and patriotism, is for the legislature, acting under the responsibility of their official oaths, to say."

In *Brodhead v. Milwaukee*, supra, it was said that considerations of gratitude alone to the soldier for his services, be he volunteer, substitute, or drafted man, will sustain a tax for bounty money to be paid to him or his family, and that the legislature may, in consideration of such services, give to the soldier or his family a suitable bounty after his enlistment, or even after his term of service has expired; that it is a matter which intimately concerns the public welfare, and that nation will live longest in fact, as well as in history, and be most prosperous, whose people are most sure and prompt in the reasonable and proper acknowledgment of such obligations. This principle was reaffirmed in the recent case of *State v. Johnson*, — Wis —, 175 N. W. 589, holding constitutional the Wisconsin Soldiers' Bonus Act.

In *Carver v. Creque*, 48 N. Y. 385, it was held that the point raised that there was no consideration as between a town voting a bounty and one who had enlisted before the town meeting has been held was as void of legal merit as of morality.

The case of *United States v. Hosmer*, 9 Wall. 432, 19 L. ed. 662, upheld a bounty claim of a soldier who enlisted in July, 1861, though the act of Congress relied upon by him was not passed until a later date, the court closing its opinion with the statement: "We may add that it would not comport with the dignity of the government thus (in the manner there urged by the attorney general) to break faith with the gallant

men who in that hour of gloom stood forth to peril their lives for their country."

In *Trustees of Cass Township v. Dillon*, supra, the questions presented closely resembled those in the instant case. A section of the Ohio constitution limited the power of the state to contract debts to seven hundred fifty thousand dollars (\$750,000). By an act of the legislature in 1861 there was authorized to be borrowed, on the faith and credit of the state, the full limit of seven hundred fifty thousand dollars (\$750,000). A few days later another act was passed to provide more effectually for the defense of the state against invasion, and by it the authority to borrow money was extended to two million dollars (\$2,000,000) more, all of which was designed to meet appropriations made for the purpose of military defense. The court said:

"The necessity for defensive war measures on the part of the state, has been repeatedly recognized and declared by the legislature. A large public debt has been created, which is warranted by the Constitution only for the purpose of repelling invasion, suppressing insurrection, or defending the state in war. For these objects the power of the state to contract debts is not limited by constitutional provisions. But, excluding these objects * * * the power of the state to contract debts is limited to seven hundred and fifty thousand dollars. * * * The defense of the state involves not merely its territorial integrity, but the preservation of its rights and interests. * * * The state has a deep interest in the preservation of the government of the United States, * * * and when endangered in war by a hostile power, the state government may, within the bounds of its own constitutional powers, aid in its preservation, and, in so doing, is but in the exercise of the legitimate powers of self-defense. The decision of the question as to whether a state of facts existed which created an exigency for the defense of the state, is necessarily vested in, and left to the wisdom and discretion of, the political department of the government; and the existence of the exigency having been decided by that department, it is not within the province of the judiciary to review that decision. If, for example, the legislature had authorized the state directly to aid in raising the troops called for by the President, and to this end had offered the bounties in question, and provided for their payment by taxation, it would not be within

the province of the court to question the validity of the law, either upon the ground that no necessity existed for the defense of the state, or that the mode of defense adopted was not legitimate. * * * Bounties are but a mode of compensation for services and may be either for past, or as an inducement to future service."

3. It is contended that the act is unconstitutional because it provides for the payment of a bonus to residents of the state who served only in the forces of nations associated with the United States, and not in the forces of the United States itself. We are of the opinion that this class is not included within the benefits of the act, for the reason that a "soldier," as defined in the act, is one who, in addition to other qualifications, "was a resident of the state of Minnesota at the time he was commissioned, enlisted, inducted, appointed or mustered into the military or naval service of the United States, and who had been or may be given an honorable or ordinary discharge or release from such service."

That the legislature contemplated making provision for resident soldiers who served with the allies only, may be conceded. But by the express language of the act its benefits are limited to those who entered the service of the United States and were honorably discharged therefrom; no language is there used which makes it possible for a soldier of any nation associated with the United States in the war with Germany, but a resident of Minnesota within the purview of the act, to determine what proof he should submit to the bonus board in support of his claim as such soldier; nor is there any language which teaches that board what it should require in the way of proof of such a soldier's qualification to become a beneficiary under this law. The situation presents a *casus omissus* which the court cannot supply by construction. 3 Dunnell, Minn. Dig. § 8985; Lewis, Sutherland St. Const. (2d ed.) §§ 605-609.

Justices Hallam and Dibell, however, are of the opinion that the act expresses an intent to provide for soldiers, residents of Minnesota, who have been or are a part of the military or naval forces of any nation associated with the United States in the war with Germany, and that it is definite enough to accomplish that result.

The majority opinion makes it unnecessary to consider the power of the legislature to provide for those who never served in the United States forces.

We hold that the law is authorized by section 7 of article 9 of the Constitution; that the debt to be created will be a direct liability of the state; that such debt will be created for a public purpose, and that the law does not include residents of Minnesota who served in the forces of the associated nations, but did not serve in the forces of the United States.

Order affirmed.

MAGGIE BOLFING v. BEN SCHOENER, AS SHERIFF OF
STEARNS COUNTY, AND ANOTHER.

HAGEN-BERG COMPANY, INC., APPELLANT.¹

January 16, 1920.

No. 21,452.

Cancellation of mortgage.

Evidence examined and *held* sufficient to sustain the finding that the indebtedness secured by the mortgage in controversy arose out of wagers on the rise or fall of the market price of grain.

Action in the district court for Stearns county to set aside a real estate mortgage. The separate answer of Hagen-Berg Company alleged that the mortgage was given to secure certain advances paid Joseph Bolfig to be used in his grain elevator business. The case was tried before Roeser, J., who made findings and dismissed the action as to the sheriff and ordered judgment in favor of plaintiff. The motion of defendant corporation for amended findings was granted in part and denied in part. From an order denying its motion for a new trial, the Hagen-Berg Company appealed. Affirmed.

Jamison, Swan, Stinchfield & Mackall, for appellant.

Paul Ahles, for respondent.

TAYLOR, C.

Action to cancel a real estate mortgage on the ground that it was given to secure an indebtedness incurred by gambling in wheat options. The court found that the indebtedness arose out of gambling transactions

¹Reported in 175 N. W. 901.

and ordered judgment canceling the mortgage. Defendant appealed from an order denying a new trial and contends that the evidence does not justify the finding.

Joseph Bolfing bought grain and operated a small elevator in the village of Cold Springs in Stearns county. Defendant is a grain commission merchant engaged in buying and selling grain on the Minneapolis Chamber of Commerce, of which it is a member. Joseph Bolfing had very little capital and made an arrangement with defendant under which defendant advanced him money to buy grain and he shipped his grain to defendant to be sold for his account on the Minneapolis market. On April 24, 1917, he and his wife executed the mortgage in controversy on their homestead to secure the balance of defendant's account against him. He died on July 5, 1917, and thereafter plaintiff, his widow, brought this action. The balance of the account remaining unpaid at his death was the sum of \$907.08 and the interest thereon.

Bolfing began dealing in options on the Minneapolis Chamber of Commerce through defendant as his broker in 1915 and continued such dealings until July, 1917, and the evidence fully justified the finding that no purchase or sale of actual grain was intended or contemplated in any of these option deals by either Bolfing or defendant. The court further found "that all of such transactions were wagers upon the rise or fall of the market, were contrary to law and void." There is no pretense that the passing of actual grain was ever contemplated in any of these option deals. They were to be settled by paying or receiving the amount of the rise or fall in the market price of the grain and were clearly illegal unless justifiable as "hedges." In the territory tributary to Minneapolis the price of grain is fixed by the Minneapolis market—the price where purchased being the Minneapolis price less the expense of shipping it from the place of purchase to Minneapolis and the profit or charge of the buyer for handling it. The price of grain varies from day to day, and the country buyer, who pays the market price at the time he receives the grain, stands to lose if the price should fall before the grain arrives at the place where he sells it. To guard against such loss a practice has grown up known as "hedging." Under this practice, in theory at least, when a buyer purchases grain in the country he also sells on the board of trade for future delivery a sufficient quantity to cover such purchase, so that

whether the price goes up or down his gain on one transaction will offset his loss on the other. As sales for future delivery in the terminal markets are made for delivery on the last day of either May, July, September or December, a country buyer, who is "hedging," usually sells his grain when it arrives at the terminal market and then closes his previous sale for future delivery by buying back an equal quantity on the board of trade. One board of trade transaction thus cancels the other and the gain or loss balances approximately the loss or gain on the actual grain bought, shipped and sold, leaving the dealer his regular profit.

Defendant insists that by "hedging" in this manner the country grain buyer merely insures himself against loss from the fluctuations of the market, and that the practice is not only legitimate, but that a buyer of limited means could not safely do business without adopting it, and further insists that the transactions here in question were simply "hedging" transactions engaged in by Bolfig for the purpose of insuring himself against loss. For present purposes we shall assume without deciding that "hedging" transactions are lawful, and come directly to the question of whether the evidence so conclusively established that the option deals here involved were in fact "hedges" that we can say that the court erred in holding that they were illegal wagers on the future price of grain instead of finding that they were "hedges."

Defendant makes the claim that the indebtedness secured by the mortgage arose out of losses which Bolfig sustained in buying grain of low grade and poor quality at too high a price. This claim is not borne out by the record. It is true that he met with considerable losses by reason of such purchases, but his transactions in actual grain during the period here involved, taken as a whole, resulted in a substantial net profit. His transactions in options during this same period, taken as a whole, resulted in a net loss which considerably exceeded his profit on the actual grain, and it is reasonably certain that the indebtedness resulted from these losses in options. Of course it does not follow from the mere fact that losses resulted from these options that they were not "hedges." According to the theory, if the market advanced there would be a profit on the actual grain and a corresponding loss on the option taken as a "hedge."

The business year or season for dealing in grain apparently begins in July and extends to the following July. On or about July 1, 1916,

Bolfing and defendant made a complete settlement of the business of the preceding year, and Bolfing paid defendant in full the balance found due as the result of the transactions of that season. While the evidence would warrant a finding that Bolfing's deals in options in the latter part of that season were in part, at least, speculations, as distinguished from "hedges" and that defendant knew it, those transactions were settled and closed and did not enter into the consideration of the mortgage in controversy. The indebtedness secured by the mortgage grew out of transactions in the year which began with July, 1916.

Defendant's ledger account with Bolfing is one of the exhibits in the case, but most of the data from which it was posted is lacking. This account contains about 40 entries of amounts gained or lost on options between July 1, 1916, and the date of the mortgage. It seems to have been the custom when an option was bought back and closed to make out a statement on that date, showing whether the option was a purchase or a sale, its date, the quantity and price of the grain covered by the option, the quantity and price of the grain bought or sold to close it out and the amount of profit or loss made on the deal, but we find only three of these statements among the exhibits.

The first shows that on August 5, 1916, 4,000 bushels of September wheat were sold to close out two options previously bought and resulted in a profit of \$638.44. The only entry in the account relating to these transactions is a credit to Bolfing on August 5 of \$638.44 by 4,000 bushels of September wheat.

The second statement shows that on August 15, 1916, 10,000 bushels of September wheat were sold to close out three options previously bought and resulted in a profit of \$746.06. The only entry in the account relating to these statements is a credit to Bolfing on August 15th of \$746.06 by 10,000 bushels of September wheat.

The third statement shows that on April 20, 1917, 10,000 bushels of July wheat were bought to close out the following four options previously sold: 4,000 bushels sold January 16; 4,000 bushels sold January 20; 1,000 bushels sold February 17, and 1,000 bushels sold March 13; and further shows that on the same day, April 20, 10,000 bushels of September wheat were sold to close out the following three options previously bought: 7,000 bushels bought March 28; 2,000 bushels bought April

14, and 1,000 bushels bought April 17; and further shows that these several transactions resulted in a net loss of \$3,961.25. The only entry in the account relating to these transactions is a charge against Bolfing on April 20 of \$3,961.25 on 20,000 bushels of wheat.

From these statements, taken in connection with the other evidence, it appears that the entries in the account were made at the time the options were bought back and closed, and merely show the net gain or loss resulting from the transactions thus closed, without showing the original options, or whether the transactions had their origin in a purchase or a sale. Whether the transactions originated in a purchase or in a sale is important, for if they were "hedges" they should have originated in a sale. While defendant is doubtless correct in asserting that, under certain conditions, a "hedge" may properly originate in a purchase, it does not appear that such conditions existed in the present case. A laborious attempt to spell out the nature of the various transactions from defendant's letters, several hundred of which are in evidence, has disclosed that many of these transactions are not explained or accounted for in those letters.

The account shows that six transactions in options were closed out in July and August, 1916, and it is reasonably certain that these transactions were speculations as distinguished from "hedges," for Bolfing had just closed the previous year's business, had shipped no grain whatever in these two months, had bought little, if any, and the two transactions of which we have detailed statements originated in purchases and not in sales. The detailed statement of April 20, 1917, shows that the transactions in July wheat closed out on that date originated in sales, but that the transactions in September wheat originated in purchases. Defendant suggests that the options in September wheat may have been bought merely as a means of closing out the options in July wheat, that Bolfing instead of closing out his "hedge" by buying back July wheat may have bought September wheat to cover it, and that this is a common practice, where the price has changed so that a heavy loss would be sustained by closing out the "hedge" at the usual time and the price of later futures looks more favorable. It is difficult to see why one who indulges in this practice is not speculating rather than "hedging." Furthermore the facts shown by the statement do not accord with this theory, for 8,000 bushels of the July wheat were sold in January and none of the September wheat

was bought until March 28 long after any legitimate "hedge" made in January ought to have been closed out. It appears from the ledger account that during the months of January, February, March and April, 1917, 11 carloads of grain were shipped and options to the extent of 39,000 bushels were closed out. As the record shows that a car usually contained about 1,200 bushels and that Bolfig did not hold any considerable quantity of grain on hand, but made shipments promptly, the court could properly infer that at least a part of the above options were speculations.

The record also discloses that Bolfig sometimes gave an order for the purchase or sale of an option, and at the same time directed that it should be closed out whenever the market rose or fell a certain amount, and that he sometimes gave an order for the purchase or sale of an option at a specified price in case the market should rise or fall, as the case might be, to that point, and that defendant executed these orders. Such transactions indicate that Bolfig was speculating rather than "hedging."

As it was intended that these option deals should be settled by paying or receiving the amount of the rise or fall in the market price of the grain without the passing of any actual grain, they were clearly illegal, unless justifiable as "hedges." Defendant, having undertaken to justify them on that ground, had the burden of presenting the proof necessary to establish its contention. But, even if the burden were on the plaintiff to show that they were not "hedges," we are satisfied that the evidence is sufficient to sustain the findings, including the finding that defendant had knowledge of the nature of the transactions.

We find no reversible errors in the rulings admitting or excluding evidence, and the order appealed from is affirmed.

CONSOLIDATED SCHOOL DISTRICT NO. 24, OF COTTON-
WOOD COUNTY AND ANOTHER v. A. O. STARK
AND OTHERS.¹

January 16, 1920.

No. 21,470.

Detaching territory from consolidated school district — finding unsupported.

Upon a consideration of the evidence presented in an appeal to the district court from an order of the county board detaching a portion of the territory of a consolidated school district and creating therefrom a common school district, it is *held* not to sustain a finding that the action of the county board was arbitrary, oppressive and in disregard of the best interests of the territory affected.

From an order of the county board of Cottonwood county granting a petition for the consolidation of certain school districts into Common School District No. 24, that district and A. H. Anderson, a resident taxpayer, appealed to the district court for that county on the grounds that the county board had no jurisdiction to act in making such order and that its action was against the best interests of the territory affected. The appeal was heard by Nelson, J., who made findings and as conclusions of law found that the board of county commissioners in forming the new district acted arbitrarily and oppressively and unreasonably and by its act impaired the usefulness of Consolidated School District No. 24 and that its action should be reversed. From the judgment entered pursuant to the order for judgment, A. O. Stark appealed. Reversed.

P. S. Redding and *E. H. Canfield*, for appellant.

S. B. Wilson and *C. J. Lourish*, for respondent.

LEES, C.

In January, 1917, common school districts Nos. 24 and 50, in Cottonwood county, each embracing substantially nine sections of land, were consolidated and designated as Consolidated District No. 24. District

¹Reported in 175 N. W. 898.

No. 50 lay directly north of district No. 24, and near its center was located the unincorporated village of Storden.

The funds of district No. 24 were turned over to the treasurer of the consolidated district and its school house removed to Storden, where the school house of district No. 50 was located, and both buildings were thereafter used by the consolidated district.

In October, 1917, a petition was presented to the county board, asking it to set apart from the consolidated district, the territory which formerly constituted district No. 24, and to create a common school district therefrom. The petition was heard on December 5, 1917, and an order made granting it. Prior to that date, the electors of the consolidated district had voted to issue bonds of the district in the sum of \$45,000 to provide funds for the purpose of building a new school house. On December 5, 1917, the bonds were issued and deposited in a bank at Mankato, the purchaser paying \$4,500 to the district treasurer, which has been kept in the treasury during the pendency of this litigation. The bank still holds the bonds and they are not to be delivered to the purchaser until the final determination of this litigation, and, if the order of the county board is upheld, they are to be returned to the consolidated district. The county board apportioned the proceeds of the bonds between the two districts, but made no division of the indebtedness of the consolidated district. The assessed valuation of taxable property within the consolidated district was \$373,431, of which \$153,898 was represented by property in common school district No. 24 and \$219,533 by property in the remainder of the consolidated district. The expense incurred in maintaining the schools in the consolidated district from September, 1917, to July, 1918, was \$6,427.73, and would amount to about \$10,000 per annum if the schools were conducted as they should be.

The consolidated district appealed from the order of the county board to the district court, where it was held that the action of the board was arbitrary, oppressive, unreasonable and substantially and practically impaired the usefulness of the consolidated district and destroyed the possibility of its continued existence, and its order was accordingly reversed. This appeal is from the judgment entered thereon.

The scope of the court's inquiry in a proceeding such as this is limited. The limitations to which the inquiry is subject are familiar, have been

frequently stated and need not be repeated here. *Farrell v. County of Sibley*, 135 Minn. 439, 161 N. W. 152; *Hall v. Board of Co. Commrs. of Chippewa County*, 140 Minn. 133, 167 N. W. 358; *Common School District v. County of Renville*, 141 Minn. 300, 170 N. W. 216; *Independent School District v. Meeker County*, 143 Minn. 169, 173 N. W. 850.

To sustain the conclusion of the trial court, it is urged that the action of the county board destroyed the possibility of the continued existence of the consolidated district, because it reduced its area to nine sections of land, and hence deprived it of the right to receive state aid as a consolidated district. It is said that without such aid it cannot employ the proper number of teachers or maintain its school as it should be maintained. The statute provides that no consolidated school district, containing less than 12 sections of land, shall be entitled to receive state aid. Laws 1915, p. 336, c. 238, § 2. The fact that the respondent district can no longer receive such aid is entitled to consideration, but is not alone sufficient to sustain the holding of the learned trial court. In *Independent School District v. Meeker County*, *supra*, the consolidated district comprised a little over 11 sections of land, having an incorporated village within its borders, and the county board detached five sections and created a common school district out of them. But for another fact, not present in the case at bar, the action of the county board would have been upheld, as will appear from an examination of the opinion in that case. The consolidated district as now constituted embraces the same territory and has the same resources as Common School District No. 50 prior to its consolidation with district No. 24.

The failure of the county board to apportion the indebtedness of the consolidated district between it and the newly organized district is of no consequence. The bonds need not be delivered to the purchaser, but may be recalled. If they are not recalled and were lawfully issued, notwithstanding the changed boundary lines, all property within the original consolidated district will continue to be liable for taxes to pay the bonds. Sections 1877 and 2677, G. S. 1913.

We are unable to perceive how the cost of maintaining the schools in either district will be any greater than it was prior to consolidation. There has been an increase in the expenses of nearly all school districts in recent years. Possibly the growing burden of expense can be best met

by the consolidation of school districts, but the difficulties which school boards encounter in meeting expenses must be solved by legislative action. The policy which may be adopted is not subject to the control of the courts. It has been in favor of increased consolidation and is actively supported by those engaged in school work, whose opinions are based on a more intimate acquaintance with our public school system than is enjoyed by the members of most county boards. But the legislature has delegated to county boards the power and duty of passing upon applications such as we have here, and the wisdom or unwisdom of their action within the limits of their powers so delegated is for the consideration of the electors by whom they are chosen.

We are unable to find sufficient evidence in the record to sustain the finding that the county board acted arbitrarily, oppressively or with an unreasonable disregard of the best interests of the territory affected, hence the judgment must be and it is hereby reversed.

F. E. BRYAN v. CAPITAL TRUST & SAVINGS BANK.

M. B. R. GORDON, SUBSTITUTED DEFENDANT,
RESPONDENT.¹

January 16, 1920.

No. 21,511.

Action upon bank check — burden of proof on plaintiff.

A check payable to the order of defendant was delivered without indorsement to plaintiff, under an agreement that it should belong to plaintiff if the statements of defendant in a report made by him respecting a mine were not substantially corroborated by H. and M. In an action to recover the amount of the check, the burden of proving that the report had not been substantially corroborated by H. and M. rested upon the plaintiff, and he failed to sustain it.

Action in the district court for Hennepin county to recover \$500 on a treasurer's check of defendant bank. The substituted defendant set up

¹Reported in 175 N. W. 897.

a counterclaim for \$7,500. The case was tried before Hanft, J., who made findings and ordered judgment in favor of defendant. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

Woodlief Thomas and A. M. Higgins, for appellant.

Ambrose Tighe, for respondent.

LEES, C.

On April 27, 1918, the Capital Trust & Savings Bank issued its treasurer's check for \$500, payable to the order of respondent Gordon. On the same day he delivered it to appellant, Bryan, taking from him a receipt containing these words: "This cheque is to belong to Mr. Frederick E. Bryan and his associates, provided the statements in the report of said Gordon on the molybdenite property at Wilberforce, Ontario, a copy of which is hereto attached, are not substantially corroborated by Prof. Hoyt and Mr. J. E. Marcell." Attached to the receipt was a copy of the report referred to. It contained, among other statements, one to the effect that a carload of average ore had been taken from the property and shipped to a concentrating company, and that the returns from this car gave .396 molybdenite. Another was that there was no doubt in Gordon's mind that the whole body of ore would average at least eight pounds of molybdenite to the ton and that in many places the ore was much richer. The report recommended the installation of an oil flotation system in the mill in which the ore was to be ground and treated. Professor Hoyt and Mr. Marcell, after examining the property, met with Bryan and Gordon and made a report of the result of the examination. Subsequently Bryan demanded payment of the check. It was refused and he brought an action upon it against the bank. Gordon was interpleaded as defendant. The bank paid the money into court and the action then went to trial between Bryan and Gordon. Gordon testified that both Professor Hoyt and Mr. Marcell told him that in their examination of the property they found everything exactly as he had represented it.

Professor Hoyt testified that he submitted to Bryan a written report he had received showing the result of an assay of samples of crude ore, which he had taken to be used in certain flotation tests he made. The re-

port was in the form of a letter addressed to him by one W. B. Timm of the Department of Mines at Ottawa, Ontario, stating that the analysis of one sample of crude ore showed 22 per cent and of another 21 per cent molybdenite.

Gordon offered no evidence in his own behalf. The findings were in his favor and this appeal is from the judgment entered thereon.

The learned trial court was of the opinion that the receipt for the check required Bryan to show affirmatively and as a condition precedent to a recovery that the statements in the Gordon report were not substantially corroborated by Professor Hoyt and Mr. Marcell, and that there was a total failure of such proof.

Bryan contends that Gordon was not entitled to a return of the check, unless he showed affirmatively that the statements in his report had been substantially corroborated by Professor Hoyt and Mr. Marcell, and that he not only failed to make such proof, but that the testimony of Professor Hoyt and the letter from Mr. Timm established the falsity of his report with respect to the quality of the ore.

We hold that the trial court placed the correct interpretation upon the receipt. The check did not become Bryan's property when Gordon delivered it to him unindorsed. It was delivered to him to be held as security for the payment of the expenses of examining the property in case Professor Hoyt and Mr. Marcell found that Gordon's report was not substantially true. The burden of proof rested on Bryan, for the check was not to belong to him, unless Gordon's report was not substantially corroborated. It was essential to his case that he should prove a negative constituting part of the substantive cause of action upon which he seeks to recover. *Brown v. Farnham*, 58 Minn. 499, 501, 60 N. W. 344; *Rotzien-Furber L. Co. v. Franson*, 123 Minn. 122, 126, 143 N. W. 253; *Dirks v. California Co.* 136 Cal. 84, 68 Pac. 487; *Jones*, Evid. § 180. Professor Hoyt's testimony concerning the quality of the ore did not contradict Gordon's report on that subject. He testified that he made tests to determine whether the flotation system was suitable for the treatment of the ore; that he took samples of the ore and used them in connection with the flotation tests, and that practically nothing was done to determine the percentage of molybdenite in the ore.

The case comes to this: Bryan did not prove that Gordon's report had

not been substantially corroborated, and Gordon did not prove that it had been substantially corroborated. There could be no presumption either way, hence Bryan, having the burden of affirmatively establishing his cause of action, must fail.

We are of the opinion that the case was correctly disposed of and the judgment appealed from is hereby affirmed.

STATE v. HERMAN A. BOHL.¹

January 16, 1920.

No. 21,521.

Indictment for illegal practice of medicine sufficient.

1. An indictment charging that, at a certain time and place, the person named therein did unlawfully practice medicine, and for a fee, prescribe, direct and recommend certain drugs and medicine for use and medicinal treatment (of a certain person) without a license so to do, states an offense under section 4981, G. S. 1913.

Same — exceptions in statute need not be negatived.

2. Nor is it necessary, under such statute, that the indictment negative the exceptions in the statute, such exceptions not appearing in the enacting clause of the act.

Remarks of prosecutor not prejudicial.

3. Remarks of the prosecuting attorney made to the jury, considered and *held* not to be prejudicial to the rights of the accused, when considered in connection with the charge.

Defendant was indicted by the grand jury of McLeod county charged with the crime of practicing medicine without first having secured a license, tried in the district court for that county before Tift, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which found him guilty as charged in the indictment. Defendant's motion for a new trial was denied. From the judgment sentencing him to the common jail for 90 days, defendant appealed. Affirmed.

¹Reported in 175 N. W. 915.

P. W. Morrison, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, and *William O. McNelly*, County Attorney, for respondent.

QUINN, J.

Defendant was indicted, tried and convicted of practicing medicine in McLeod county, in this state, between the seventeenth and twenty-fourth days of March, 1919, without a license so to do. From an order denying his motion for a new trial defendant appeals.

It is contended on behalf of appellant: (1) That the indictment fails to state a public offense; (2) that the evidence is not sufficient to support the conviction; (3) that the prosecuting attorney was guilty of such conduct in his opening address to the jury as to prejudice the rights of the defendant.

The indictment charges in effect that the defendant, between the seventeenth and twenty-fourth days of March, 1919, at the city of Glencoe, did unlawfully practice medicine, and, for a fee, prescribe, direct and recommend certain drugs and medicine for the use and medicinal treatment of one William Frank Bedner, without a license so to do. The indictment charges a violation of section 4981, G. S. 1913. *State v. Rolph*, 140 Minn. 190, 167 N. W. 553, L.R.A. 1918D, 1096.

The objection that the indictment fails to negative the exceptions in the statute, namely, that the defendant was not a surgeon of the United States army or navy, and that he was not a physician from another state in consultation, etc. is not well taken. *State v. Schmidt*, 111 Minn. 180, 126 N. W. 487; *State v. Corcoran*, 70 Minn. 12, 72 N. W. 732.

The undisputed testimony shows that, at the time stated in the indictment, William Frank Bedner was less than one year of age and was ill at his mother's home near Glencoe; that the mother called the defendant over the telephone to come and treat the child; that defendant responded to such call, examined the child, left some medicine for him, prescribed further treatment and received a fee of \$15 therefor. The defendant offered no testimony, nor was there any proof that he was licensed to practice medicine.

Upon the trial a druggist of the city was called as a witness. He pro-

duced 60 prescriptions issued to divers persons in the vicinity, which had been filled at his drug store, all bearing date during the week mentioned in the indictment. The witness testified that these prescriptions all bore the signature of the defendant in his own handwriting, with the letters "M. D." appended hereto. They were all admitted in evidence, over defendant's objection, as bearing upon the question whether the defendant held himself out as a practicing physician in the vicinity.

Considerable was said by the county attorney in his opening address to the jury which might well have been left unsaid, but under the instructions of the court in reference thereto, the rights of the defendant were in no way prejudiced.

We find no reversible error in the record and the order appealed from is affirmed.

MARION RANDOLPH STAPP v. EDWARD C. JERABEK.¹

January 16, 1920.

No. 21,523.

Negligence of driver — verdict sustained by evidence.

1. In action for personal injuries, suffered by plaintiff as a result of a rear end collision with an auto-truck by a motor-cycle, driven by him, which collision was caused by the sudden slackening of the speed of the truck in turning the same around in the middle of the block, without notice by extending the hand of the operator or otherwise, it is *held*, following *O'Neil v. Potts*, 130 Minn. 353, that the evidence supports the verdict.

Damages not excessive.

2. The damages are not so excessive as to justify interference by this court.

Action in the district court for Ramsey county to recover \$13,500 for personal injuries. The answer alleged negligence on the part of plaintiff. The case was tried before Haupt, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$3,485. From an order denying his motion for

¹Reported in 175 N. W. 1003.

judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Donagre, McDermott & Stearns, for appellant.

William H. Seward, Sanborn, Graves & Appel and *T. P. McNamara*, for respondent.

BROWN, C. J.

Action for personal injuries in which plaintiff had a verdict and defendant appealed from an order denying his motion for judgment or a new trial.

There is no substantial dispute in the evidence upon the issue of negligence and the jury were justified in finding the following facts: Defendant was operating an auto-truck in a northerly direction on Rice street in the city of St. Paul, running at about 20 miles an hour. Plaintiff was following on a motor-cycle. At a point midway of the block between Carbon and South streets defendant suddenly and without warning of any kind, by extending his hand or otherwise, slackened the speed of the truck and abruptly steered to the left, for the purpose of turning the truck to return into the city. Plaintiff was close behind at the time and defendant was aware of his presence riding the motor-cycle. The suddenness of the act of defendant in attempting to turn his truck, without previously giving the customary warning by extending his hand, caused plaintiff's motor-cycle to collide with the rear thereof with such force and violence as to throw plaintiff to the curb and street pavement, causing the injuries complained of. Plaintiff made every effort to avoid the collision after discovering the movement of the truck, but was unable to do so.

The evidence brings the case within the rule stated and applied in *O'Neil v. Potts*, 130 Minn. 353, 153 N. W. 856. There is no fair doubt of the negligence of defendant. He knew that plaintiff was following him, and his failure to give the customary warning is unexcused. The record is not so clear as to the contributory negligence of plaintiff. But a careful reading of the evidence leads to the conclusion that the question whether he contributed to the accident and resulting injury by the reckless operation at a dangerous speed of his motor-cycle was one of fact

and properly submitted to the jury. We find no sufficient basis for interference with the verdict.

The point that the damages are excessive and given under passion and prejudice is not sustained. The evidence as to the nature and character of plaintiff's injuries is conflicting, as far as the medical testimony is concerned, and, if that tendered by plaintiff expresses the truth, a question for the jury, the damages are not beyond fair compensation. The trial judge has approved the amount and we are not prepared to say that in so doing there was an abuse of the discretion vested in him in such cases. *Viou v. Brooks-Scanlon Lumber Co.* 99 Minn. 97, 108 N. W. 891.

Order affirmed.

MARTIN V. HAVEL AND ANOTHER v. JAMES COSTELLO AND OTHERS.¹

January 16, 1920.

No. 21,535.

Cancellation of deed and mortgage — estoppel of plaintiffs.

Plaintiffs, husband and wife, joined in the sale and conveyance of the land involved in the action, which at the time constituted their homestead; the grantee fraudulently caused the deed to be recorded in violation of an agreement not to do so until the purchase price of the property had been paid; he thereby defrauded plaintiffs for he never paid the instalment of the purchase price agreed upon; the grantee mortgaged the property to defendant Fitzgerald to secure the payment of \$4,000, then loaned to him, and the mortgage was duly recorded: the loan of the money by Fitzgerald was bona fide, in reliance upon the validity of the title of the grantee, and without notice of the rights of plaintiffs. It is *held*:

(1) That on the facts stated plaintiffs are estopped to question the validity of the mortgage.

(2) That the inquiry made by defendant of the husband as to the rights of plaintiffs in or to the land, particularly stated in the opinion, was specific and clear, and put him to the disclosure of any claim then existing in their favor.

¹Reported in 175 N. W. 1001.

(3) That separate inquiry of the wife, on the facts here disclosed, was not necessary.

(4) The evidence sustains the findings of the trial court and the facts found sustain the conclusions of law.

Action in the district court for Le Sueur county for an accounting; to have a certain deed canceled; to decree plaintiffs to be the owners and entitled to possession of the 80-acre tract; and to cancel two mortgages. The facts are stated in the opinion. The case was tried before Tift, J., who made findings and as conclusions of law found that as to defendants, other than defendant Fitzgerald, plaintiffs were entitled to judgment decreeing plaintiff Martin V. Havel to be the owner in fee simple of the premises; that the deed to Costello was fraudulent and void; that, as between plaintiffs and defendant Ramsey County State Bank, its mortgage was not a bona fide lien; that as to defendant Fitzgerald defendant James Costello was the owner in fee of the premises described in the \$4,000 mortgage at the time of its execution and delivery, and that the mortgage was a valid lien. From an order denying their motion for a new trial as against defendant Fitzgerald and particularly denying a new trial as against him of the issue of estoppel raised by him on the trial, plaintiffs appealed. Affirmed.

H. E. Fryberger, for appellants.

D. E. Dwyer, for respondent Fitzgerald.

BROWN, C. J.

Plaintiffs are husband and wife. The husband, Martin V. Havel, was the record owner of the land in controversy in the action, consisting of 80 acres near the village of Montgomery in Le Sueur county, and for a time prior to November, 1916, resided thereon with his wife, and it constituted the family homestead. Some time during the month stated they moved from the farm to the village, where the husband carried on his business as a dentist, and with his wife took up his residence in a hotel building therein which he also owned. In January, 1917, he sold and conveyed the farm property to one James Costello, a defendant in this action, and the deed of conveyance in which the wife joined was delivered over to the grantee, Costello, who soon thereafter caused it to be recorded in the office of the register of deeds. Thereafter, in February, 1917, Cos-

tello applied to defendant Fitzgerald for a loan of \$4,000, tendering as security for its repayment a mortgage upon the land. Abstracts of title were presented, which showed clear title in Costello, and subsequent negotiations resulted in the loan being made, and the execution by Costello and his wife to Fitzgerald of a mortgage upon the land as security. The mortgage was duly recorded. In April following plaintiffs brought this action to annul and set aside the conveyance to Costello, and the record thereof, and that plaintiffs be decreed the owners of the land free and clear of the Fitzgerald mortgage and certain adverse claims by the other defendants. The ground of the action was that the deed to Costello was procured by fraud, and was recorded by him in violation of an express understanding that it should not be recorded until the transaction had been completed by the payment of the purchase price of the property; and as against defendant Fitzgerald, that he knew or by proper inquiry could have ascertained the facts constituting the fraud, and of the rights of plaintiffs in and to the land, notwithstanding the appearances created by the recorded Costello deed, therefore, that he is not a good-faith mortgagee. Plaintiffs had judgment establishing their rights as against all the defendants except Fitzgerald, who prevailed on the ground that he was a bona fide mortgagee, and that plaintiffs are estopped to challenge the validity of his mortgage.

The facts are not in substantial dispute. Plaintiffs were cheated and defrauded by Costello who wrongfully recorded his deed, thus giving notice of record that he owned the land, when in fact he did not, the transaction not then having been completed. But defendant Fitzgerald was in no way involved therein; he was not a party to that transaction, nor advised of the fact that the fraud had been committed or the deed wrongfully recorded. He accepted the record as he found it and is entitled to its protection, unless he failed to make proper inquiry to learn the facts before making the loan. The court found as a fact that, at the time of the negotiations with Costello, Fitzgerald learned that plaintiffs had resided upon the land prior to November, 1917, but moved therefrom on the sixteenth of the month, leaving some articles of personal property thereon, creating in the view of his attorney a situation making necessary an inquiry as to what their rights were. And before completing the loan, the attorney, acting for Fitzgerald, on February 16,

1917, wrote and mailed to plaintiff Martin V. Havel the following letter of inquiry, namely:

"Dr. Havel, Montgomery, Minn.

"Dear Sir:

I am examining the title to the E $\frac{1}{2}$ of the NW $\frac{1}{4}$, Section 20, Township 111, Range 23, LeSueur County, Minnesota, for a client of mine who is making a deal with James Costello, who is shown by the abstract of title to the property to be the owner thereof. It appears this land was conveyed by you to Mr. Costello some time early this year, and I have inquired from Mr. Costello as to who is in possession at this time of the land, and he informs me that although you have moved off the farm, considerable of your personal property is still there. Under the law my client is chargeable with notice of the rights of a person in possession of the land, and although Mr. Costello informs me that you have no further claim to it, or interest in it, I feel it is our duty to make direct inquiry from you about the matter. I would therefore be greatly obliged if you will let me know if possible by letter mailed this afternoon, whether or not you now claim any right or interest in this land. I am enclosing herewith, a self addressed and stamped envelope, and wish to thank you in advance for such information as you may give me."

The letter was received by Dr. Havel on the day of its date, and on the same day he wrote and mailed to the attorney the following letter in response:

"Yours just received. In reply wish to state that Mr. Costello got the deed to the 80 acres about a month ago. I have some hay and some firewood and potatoes in cellar on the place to take off by April 1st. I will have everything off long before the 1st of April."

Upon the receipt of this letter by Fitzgerald's attorney the loan to Costello was completed and the money paid over to him. The mortgage upon the land to secure the same was properly executed by Costello and wife and was duly recorded on February 20, 1917. There is no claim that either Fitzgerald or his attorney knew anything about the transaction as the result of which the land was conveyed to Costello. Both proceeded in the loan to Costello in entire good faith and in reliance upon the validity of the Costello title.

This state of the facts, about which there is no serious controversy, will permit of but one conclusion. Fitzgerald performed every duty he owed to plaintiffs, at least to Dr. Havel by the inquiry made of him, and having failed in response thereto to disclose or claim any interest in the land, he cannot now be heard to set up the infirmity of Costello's title. *Macomber v. Kinney*, 114 Minn. 146, 128 N. W. 1001, 130 N. W. 851; *Niles v. Cooper*, 98 Minn. 39, 107 N. W. 744, 13 L.R.A.(N.S.) 49; *Hafter v. Strange*, 65 Miss. 323, 3 South. 190, 7 Am. St. 659; *Gill v. Hardin*, 48 Ark. 409, 3 S. W. 519; 10 R. C. L. 788. The suggestion is made by his counsel that Dr. Havel did not understand the purport of the letter, and therefore should not be held strictly to account for his failure in reply to state the facts now relied upon in attempted avoidance of the mortgage. The point is without special force. It appears that Dr. Havel is a man over 40 years of age, possessing general business qualifications; he had had other real estate transactions, and experience to some extent in matters outside of his business as a dentist. The letter of inquiry was couched in plain language, and put the direct request for information as to any right or interest he claimed in or to the land in terms that could not well have been misunderstood by a person of the most ordinary intelligence. It was sufficient to call from him an assertion of any claim he then had to the land. But he made none. On the contrary was careful to impress upon the mind of the inquirer for information that he would be entirely off the land long before April 1. He apparently placed the most explicit confidence and faith in Costello, and at the time he replied to the Fitzgerald inquiry believed that he would fully meet the terms of the sale and conveyance of the land to him. He is in no position to unload his disappointment and loss upon Fitzgerald, whose good faith in the matter stands unchallenged on the record. The conclusion of estoppel is therefore the only one the facts will warrant.

We do not see that Mrs. Havel occupies any better position. She had as against Fitzgerald no valid claim of title to the land or of any specific interest therein. Although she may have contributed some of the purchase price when the land was originally acquired, the title with her acquiescence had been vested in her husband, and he was of record the sole owner, and both joined in the conveyance to Costello. And, unless separate inquiry as to her rights was necessary, she is equally estopped.

Goldberg v. Parker, 87 Conn. 99, 87 Atl. 555, 46 L.R.A.(N.S.) 1097, Ann. Cas. 1914C, 1059; Ann. Cas. 1914C, 1059, and cases cited in the note. The rule is the same, although the property may have constituted the family homestead. Bullock v. Miley, 133 Minn. 261, 158 N. W. 244. But it seems clear that separate inquiry of Mrs. Havel as to her rights or interest in the property was unnecessary. She had parted with the homestead interest by the deed to Costello, and was not either in the actual or constructive possession of the property. She moved therefrom in November and did not return until some time late in March, long after the rights of Fitzgerald had accrued. This is not a disputed fact on the record. There was in fact no actual occupancy or possession of the property by either husband or wife, though the constructive possession, according to the findings of the trial court, was in the husband, and sufficient as notice of his rights to all parties dealing with Costello. Plaintiffs, so far as the record discloses, were living amicably together, and there is no suggestion of a purpose, secret or otherwise, on the part of her husband to cheat or otherwise deprive her of any right she might have had in the land. In that state of the facts separate inquiry of her was unnecessary. Coles v. Yorks, 28 Minn. 464, 10 N. W. 775.

This disposes of the case and further elaboration or discussion is unnecessary. Order affirmed.

COUNTY OF ITASCA v. GEORGE A. RALPH AND OTHERS.¹

January 16, 1920.

Nos. 21,547, 21,548.

Drain — payment of preliminary expenses by county.

1. The preliminary expenses in drainage proceedings may be paid by the county, without a hearing, where the county knows them to be just and true.

Order establishing ditch may be vacated.

2. The court has the power to vacate an order establishing a ditch upon seasonable application therefor, following Troska v. Brecht, 140 Minn. 233.

¹Reported in 175 N. W. 899.

Estoppel against party participating in subsequent proceeding.

3. One who, after the order establishing a drainage project has been vacated, takes part in the subsequent proceeding therein to establish the project in a modified form, and appeals from the final order dismissing the proceeding, is concluded thereby from questioning the order vacating the order establishing the ditch.

Admission of evidence.

4. There could be no prejudicial error in the admission of certain evidence in this case.

Interest — amount not reviewable on appeal.

5. The amount of interest included in the verdict, not having been questioned in the court below, cannot be questioned on appeal.

After the former appeal reported in 139 Minn. 332, 166 N. W. 405, the cases were tried before Brill, J., who at the close of the testimony denied defendants' motions for directed verdicts and granted plaintiff's motion for directed verdicts in its favor. From an order in each case denying their motion for judgments notwithstanding the verdict or for a new trial, defendants appealed. **Affirmed.**

Duxbury & Duxbury and W. R. Duxbury, for appellants.

Ralph A. Stone and Thomas D. O'Brien, for respondent.

HOLT, J.

The two actions are predicated upon two bonds given under these circumstances: In October, 1913, the four defendants in the first action petitioned for Judicial Ditch No. 2 in Itasca county, and presented a proper bond signed by them, two as principals and the other two as sureties. The bond was duly approved by the court, and such proceedings were had that on March 2, 1914, an order was made establishing the ditch. Mr. William A. Watts had appeared as attorney for the petitioners in the proceeding. Soon after the order was made, an action to enjoin the proceeding because of alleged irregularities therein was commenced by interested parties, and Mr. Watts began to entertain misgivings as to the validity of the order because of defects in the description of the ditch and the inclusion in the drainage territory of lands belonging to a different watershed. After some consultation with the judge who had made

the order, Mr. Watts presented an affidavit to the court, stating these matters fully, and asked for an order vacating the order of March 2, eliminating that part of the territory which was in a separate drainage district, requiring the engineer to modify the original plans accordingly and the viewers to reassess damages and benefits, and also providing for a final hearing upon due notice. An order was made as prayed on June 3, 1914. Prior thereto, and on June 1, 1914, the petitioners, except Larson whose lands had been eliminated from the proposed drainage district, had presented an additional bond for \$1,500, executed by the three defendants in the second action, which was approved and filed by the clerk of the district court on that day. This bond was evidently given in response to a request of the court for additional security to cover the expenses to accrue from the anticipated vacation of the order of March 2, 1914, and the further work of the engineer and viewers required for the establishment of the desired modified drainage project. Thereafter hearings were had, resulting in an order refusing to establish the ditch and dismissing the proceeding. The petitioners appealed, but the order was affirmed in this court. In re Judicial Ditch No. 2, 139 Minn. 332, 166 N. W. 405. Thereupon these two actions, to recover from the signers of the bonds the expenses of the drainage proceeding paid by the county, were brought. The two actions were tried together, and when the evidence was in both parties moved for directed verdicts. The court directed verdicts in favor of plaintiff, and the defendants in each case appeal from the order denying their motion for judgment notwithstanding the verdicts or a new trial.

It stands admitted upon this record that the expenses paid by the county in the drainage proceeding exceed the amount of the two bonds. Appellants contend that, even though liability be conceded, no recovery can be had because there was no hearing of the claims upon notice to the county, citing *State v. District Court of Thirteenth Judicial District*, 138 Minn. 204, 164 N. W. 815. The case is not in point. It was there sought to hold the county to the payment of a claim to which it objected. Here the county recognized the expenses made as just and paid them. It could and did waive the notice of hearing on the claims so paid. Appellants do not suggest by pleading or proof that any expense paid by the county was unjust or invalid.

The main contention of appellants is that with the filing of the order of March 2, 1914, the court parted with jurisdiction in the proceeding, as the law then stood, and that the order vacating the order establishing the ditch and all proceedings thereafter were null and void for want of jurisdiction. Aside from the inherent power a court has to vacate orders or judgments improvidently granted, express authority is given by sections 7746 and 7786, G. S. 1913, which have been held applicable to an order establishing a drainage project in *Troska v. Brecht*, 140 Minn. 233, 167 N. W. 1042.

Furthermore, the appellants do not seem to be in a position to attack collaterally the disposition of the drainage project, instituted upon their petition and championed by them to a final determination in this court. It is said Mr. Watts had no authority from the petitioners to apply for a vacation of the order of March 2, 1914. We think that is immaterial now, for, instead of raising that point in the subsequent proceedings in the district court, they all joined in taking an appeal from the final order dismissing the drainage project, and Mr. Watts, admittedly, as their attorney, took and prosecuted the appeal. No attack was made in the appeal upon the order vacating the order establishing the ditch, nor was the procedure, up to the final order refusing to establish it, questioned. In addition, the record clearly shows that the appellant, Ralph, though at first of the opinion that they might safely rest on the order of March 2, finally consented that Mr. Watts should apply for its vacation. Ralph appears to have been the moving spirit in the enterprise and attended and took part in the subsequent hearings. The appellants, save Larson, executed the second bond in order to secure the privilege of amending the drainage applied for so as to eliminate certain lands, to secure more accuracy in the description of the ditch, and to be able to present further evidence. In view of all this, when sued on these bonds which in terms obligated the signers to "pay all the expense in case the court shall fail to establish said proposed ditch or any part thereof," the appellants ought not now to be heard to say that the order of March 2, 1914, still stands, although a later order dismissing the whole project has been affirmed by this court upon their appeal.

Since our conclusion is that the appeal taken by the defendants from the order dismissing the ditch proceeding so bound them that they can-

not now attack the final disposition of the matter in this collateral proceeding, no prejudicial error could result from the reception of evidence concerning the authority of Mr. Watts to appear for the appellants other than Ralph in the application to vacate the order of March 2, 1914.

Error is assigned on the amount of interest included in the verdicts. The attention of the court below was not invited to the matter either at the trial or in the motion for a new trial. It cannot be considered here.

The orders are affirmed.

JOHN BUHNER v. OTTO REUSSE AND OTHERS.¹

January 16, 1920.

No. 21,562.

Malicious prosecution — want of probable cause — dismissal.

In this action for malicious prosecution plaintiff failed to show want of probable cause, and the court did not err in granting defendants' motion for a dismissal.

Action in the district court for Murray county to recover \$5,000 for malicious prosecution. The case was tried before Nelson, J., who when plaintiff rested dismissed the action. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

Wilson Borst, for appellant.

A. W. Tierney and *C. T. Howard*, for respondents.

HOLT, J.

The action was dismissed when plaintiff rested. The appeal is from the order denying plaintiff's motion for a new trial.

Plaintiff sued, alleging that defendants conspired together for the purpose of ruining his business, and to that end maliciously and without probable cause instituted criminal proceedings against him for the alleged violation of a village ordinance. Defendants answered separately. The facts as developed at the trial are substantially these: Plaintiff, a resident of the village of Fulda, for many years raised flowers, vegetables

¹Reported in 175 N. W. 1005.

and garden stuff which he peddled in the village and vicinity. He also in the fall bought a few carloads of apples which he retailed from the car, without unloading. The village had an ordinance requiring a license from transient merchants, and imposing penalties for a violation thereof. In the fall of 1915, a car of apples was shipped to plaintiff and he undertook to retail them from the car as it stood on a side track. On October 21, 1915, and again the next day, the defendant Mathiason swore to a complaint before a justice of the peace, charging plaintiff with violating this ordinance in thus disposing of the apples. He was found guilty in the justice court, but, on appeal to the district court, was acquitted. Mathiason was the village marshal, and was directed by the village council, of whom defendant Reusse was president, to make the complaint. Defendant Tierney was the village attorney who had charge of the prosecution.

It was necessary for plaintiff to prove both malice and want of probable cause. If there was probable cause for the prosecution, this action must fail, even though actual malice was proven against defendants. Want of probable cause cannot be inferred from existence of actual malice. Since we conclude that the appeal must be disposed of upon the question of probable cause, it is not necessary to consider the evidence as to malice.

When the facts relating to want of probable cause are undisputed the question whether it has been established is for the court. *Cox v. Lauritsen*, 126 Minn. 128, 147 N. W. 1093, and cases therein cited. There is here much to indicate the existence of probable cause. The defendants were officers charged with the duty of enforcing the ordinances of the village. They could scarcely question the validity of a duly enacted ordinance. The justice of the peace had jurisdiction of offenses under this ordinance and found plaintiff guilty of the charge made against him. In many jurisdictions this result would be conclusive that probable cause existed. That is not the rule in this state. A conviction of the plaintiff, which was reversed on appeal and the plaintiff discharged, is not conclusive, but strong *prima facie*, evidence of probable cause. *Skeffington v. Eylward*, 97 Minn. 244, 105 N. W. 638, 114 Am. St. 711. We think the record is barren of any substantial evidence rebutting the strong *prima facie* case of probable cause made by the conviction before the justice. A sporadic business enterprise, such as the selling at retail of two

or three cars of apples in the fall of the year, using the car in which they were shipped as a store, may, in the mind of the ordinarily prudent and intelligent person, create an honest belief that it was a transient business, or the business of a transient merchant and required a license. At the most, it may be claimed that the ordinance is of doubtful validity if applied to what plaintiff did.

In *Whipple v. Gorsuch*, 82 Ark. 252, 101 S. W. 735, 10 L.R.A. (N.S.) 1133, 12 Ann. Cas. 38, a criminal prosecution was instituted, charging a violation of a statute making it a misdemeanor "to sever from the freehold any produce thereof or anything attached thereto," in that the tenant had torn down a "For Rent" sign placed by the landlord on the outside wall of the rented rooms. The prosecution was dismissed and the tenant brought an action for malicious prosecution. The court said the alleged offense did not fall within the statute, but yet held the statute to be of such doubtful construction that the act of the tenant in tearing down the notice was sufficient to constitute probable cause for the prosecution, if the landlord was thereby induced to believe that the tenant had violated the statute. The court also stated: "A well founded doubt as to the law may constitute probable cause which would justify a prosecution, the same as doubt concerning the facts, if such doubt induces in the mind an honest belief that there are legal grounds for the prosecution."

Probable cause has been defined "as the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted." *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19; *Stacey v. Emery*, 97 U. S. 642, 24 L. ed. 1035. Such is virtually the definition adopted by this court. *Burton v. St. Paul, M. & M. Ry. Co.* 33 Minn. 189, 22 N. W. 300; *Cox v. Lauritsen*, *supra*.

There is no dispute as to the facts constituting the alleged violation of the ordinance upon which defendants acted. The ordinance was pleaded and the court was bound to take judicial notice thereof. Section 7773, G. S. 1913. So that there was nothing to submit to a jury on the question of probable cause. And we hold that the evidence does not make out want of probable cause. The court was therefore right in dismissing the case.

Order affirmed.

STATE v. ARTHUR DEIKE.¹

January 16, 1920.

No. 21,567.

Bastard — verdict sustained.

1. In an action to determine the paternity of an illegitimate child the evidence is *held* to sustain the verdict.

Corroboration of mother's testimony unnecessary.

2. Evidence in corroboration of the mother on the question of paternity in such cases is not necessary.

Action in the municipal court of Redwood Falls to determine the paternity of an illegitimate child. The case was tried before Converse, J., judge of the First judicial district sitting in place of the judge of the Ninth judicial district, by order of the Governor of the state, and a jury which found defendant guilty as charged in the complaint. From an order denying his motion for a new trial, defendant appealed. Affirmed.

A. R. A. Laudon, John A. Dalzell and Arthur L. H. Street, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General and *Albert H. Enersen*, County Attorney, for respondent.

BROWN, C. J.

The sole question involved in this appeal is whether the verdict is so clearly and manifestly against the evidence as to call for interference by this court. We answer it in the negative.

The issue in the case, the paternity of complainant's illegitimate child, was closely contested on the trial below, and the cause is presented in this court by counsel for defendant with much earnestness and eloquence, and in the evident good-faith belief in his innocence. But neither eloquence nor earnestness of counsel can be permitted to supplant the cold fact, disclosed by the record, that complainant gave direct and positive evi-

¹Reported in 175 N. W. 1000.

dence of the guilt of defendant, which if believed by the jury and trial court was sufficient without corroboration to justify the verdict of guilty. While it is true that defendant explicitly disputed the evidence of complainant, and presented other evidence by way of an alibi, yet the evidence as a whole presented a question of veracity between complainant and defendant, presenting an issue of fact for the jury. *State v. Foster*, 141 Minn. 140, 169 N. W. 529.

So far as the record discloses the trial was eminently a fair one, and the criticisms of counsel, aimed at the memorandum of the trial judge appended to the order denying a new trial, are without substantial support.

Order affirmed.

IN THE MATTER OF THE ESTATE OF EMMA A. FORD,
DECEASED.

EFFIE BOGART AND ANOTHER v. W. D. TAYLOR.¹

January 16, 1920.

No. 21,591.

Will — attempted bequest in trust invalid.

1. Testatrix, by her will, bequeathed to a person named therein the sum of \$4,000, to be used by him for the extension of the Kingdom of God in a certain church. *Held*, that the bequest was not an absolute gift to the person named, but was an attempted bequest in trust for the purpose stated in the will, and invalid because the beneficiaries are not certain or capable of being made certain.

Same — effect of decree of probate court.

2. A decree of the probate court establishing a will, unless reversed on appeal, is conclusive that the instrument was duly executed by the person whose will it purports to be, and that such person had legal capacity to execute it.

From an order of the probate court for Ramsey county, Bazille, J., ordering the executors of the last will of testator to pay the legatees named in paragraph thirteen of the will and a partial decree in favor of D. B.

¹Reported in 175 N. W. 913.

Humphrey, Charles Humphrey, Oel S. Ford, personally and as representative of the estate of Luna Hale, Effie Bogart, Amanda Thore and the residuary legatees appealed to the district court for that county. The appeal was heard by Haupt, J., who made findings and affirmed the order of the probate court in respect to the payment of the legacy to Elder W. D. Taylor, and vacated so much of the order as purported to exclude Effie Bogart and Amanda Thore from the provisions of the will. From the order denying their motion for a new trial, Effie Bogart and Amanda Thore appealed. From an order denying their motion for a new trial, the residuary legatees other than Amanda Thore and Effie Bogart appealed. Reversed.

Douglas, Kennedy & Kennedy, S. R. Child and Sherman Child, for appellants.

Stringer & Seymour, for respondent Taylor.

QUINN, J.

Emma A. Ford died testate in December, 1914. Her will was duly presented, proved and admitted to probate without objection in January, 1915. The instrument is in typewriting and contains 17 paragraphs bequeathing property to different parties. Paragraphs 13 and 17 are the only provisions here necessary to be considered. They are as follows:

"Thirteenth, I give and bequeath to Elder W. D. Taylor, the sum of Four Thousand Dollars (\$4,000.00) to be used by him for the extension of the Kingdom of God in the Christian Catholic Apostolic Church in Zion, better known as the Elder Taylor Branch."

"Seventeenth, All the rest, residue and remainder of my estate of whatsoever the same may consist and wheresoever the same may be situated, I give, devise and bequeath in equal shares to Mr. T. B. Humphrey of Churubusco, New York, Luna Hale of Shelby, Michigan, Mr. Charles Humphrey of North Bangor, New York, Oel S. Ford and (Mrs. Lillard, Mrs. Bogart, Mrs. Thore-Ida Cooke) David B. Humphrey, share and share alike."

The four names in parentheses in paragraph 17 were interlined with pencil in the handwriting of the testatrix.

The administering of the estate proceeded in the usual manner. The

legacies were all paid except those mentioned in paragraphs 13 and 17. In November, 1918, the executor applied to the probate court for a decree of distribution of the residue of the estate. Upon the hearing therefor the question as to whether the persons whose names appear as having been interlined in paragraph 17 were entitled to participate as residuary legatees, was litigated under objection. Thereafter the probate court entered a decree directing a sale of a portion or all of the real estate and that the executors, upon receipt of sufficient funds, pay the legacy provided for in paragraph 13, and, that a portion of the residue of the estate be assigned to T. B. Humphrey, Charles Humphrey, Oel S. Ford, and Oel S. Ford, as representative of the estate of Luna Hale, deceased, and Elizabeth Humphrey, as administratrix of the estate of David B. Humphrey, deceased, as in the will provided, share and share alike, thereby excluding as residuary legatees those persons whose names appear to have been interlined.

All of the residuary legatees appealed to the district court from the order directing payment of the legacy to Elder W. D. Taylor. Mrs. Bogart and Mrs. Thore appealed from that part of the decree excluding them as residuary legatees. The district court confirmed the order of the probate court for the payment of the legacy to Taylor, and directed that the order of the probate court be amended so as to provide that Effie Bogart and Amanda Thore take equally with the other residuary legatees. All the residuary legatees appealed from the order of the district court directing payment of the bequest to Elder Taylor, and the other residuary legatees appealed from the order allowing Mrs. Bogart and Mrs. Thore to share in the distribution.

Two questions are presented for consideration. First: Is the bequest to Elder Taylor an absolute gift to him, or is it an attempted bequest in trust and therefore invalid because the beneficiaries are not certain or capable of being made certain? Second: Is the decree of the probate court, allowing and admitting a will to probate, without objection or appeal, conclusive as to the contents of the instrument?

1. Sixteen paragraphs of the will contain absolute gifts to friends and relatives in plain unqualified terms. Paragraph 13 manifests an entirely different purpose. By the terms there employed a stated amount is given to the party named, to be used by him for the extension of the

Kingdom of God, in the Elder Taylor Branch of the Church in Zion. A clear direction, it would seem, as to where and how the bequest should be used. As we read paragraph 13 it does not show that the sum stated was ever given or attempted to be given to the person named therein for his use or benefit. We think the opposite appears. Testatrix was a devoted adherent to the Taylor Branch of the church. This fact appears not only from the bequest but more emphatically from the testimony of Elder Taylor. It was her apparent purpose to assist in the extension work therein. It will hardly be contended that if Taylor had not been at the head of that branch of the church his name would have appeared in the will. It seems clear from a mere reading of the paragraph that the bequest was intended for the benefit of more than one individual. Who the beneficiaries might be is left a matter of conjecture. The bequest is to the person named to be used for the object stated. It gives to him no beneficial interest therein. The case comes squarely within the rule announced in *Shanahan v. Kelly*, 88 Minn. 202, 92 N. W. 948. If the trust cannot be carried out according to the intention of the testatrix, it must fall. Nor does the failure thereof for want of certainty establish the same as an absolute gift to the person named, but it invalidates the entire attempted bequest. As is said in *Watkins v. Bigelow*, 93 Minn. 210, 224, 100 N. W. 1104:

“An absolute gift is one where not only the legal title, but the beneficial ownership as well, is vested in the donee. A gift in trust is one where the subject of the gift is transferred to the donee, not for the purpose of vesting both the legal title and beneficial ownership of the subject in the donee, but that it may be held and applied to certain uses for a third party.”

2. Under the statutes of this state any person interested in the estate, at any time after the death of the testatrix, may petition the probate court to have the will proved. G. S. 1913, § 7266. They further provide:

“No will shall be effectual to pass either real or personal estate unless duly proved and allowed in the probate court or on appeal. Such probate shall be conclusive as to the due execution of a will.” Section 7255.

“No one shall be heard to contest the validity of a will unless the

grounds of objection thereto are stated in writing and filed in court before the time appointed for proving the will." Section 7270.

It is insisted on behalf of the objectors, that the names interlined in paragraph 17 were written therein subsequent to the execution of the will, without attestation, and that they were entitled to show the fact upon the hearing for distribution, and, that the persons whose names were so inserted should be excluded as residuary legatees. The question presented is, whether the allowance of a will and its admission to probate by the probate court, without objection or appeal, upon hearing of the application to admit the will to probate, is conclusive. The trial court held, and we think correctly, that it is. The statute provides specifically how and when objections to the validity of a will shall be made. The question was considered in *Greenwood v. Murray*, 26 Minn. 259, 2 N. W. 945. It was there held that a decree of the probate court establishing a will is, unless reversed on appeal, conclusive that it was duly executed by the person whose will it purports to be, and that such person had legal capacity to execute it. What matter is contained in a will is for determination when the instrument is being considered at the hearing for proving the will. What construction is to be placed thereon is for later consideration. The instrument, with the interlineations unchallenged, was allowed and recorded by the judge of probate, as and for the last will and testament of the deceased. There was no appeal from the decree and it must be considered conclusive as to whether the instrument was the will of the testatrix.

The order of the district court directing that the order of the probate court be amended so as to allow Effie Bogart and Amanda Thore to share equally with the other residuary legatees is affirmed. Mrs. Lillard and Mrs. Cooke make no claim to the estate, each having filed a release of all interest therein.

The order of the district court holding valid the bequest in paragraph 13 of the will is reversed.

OLIVER BURSAW, AS ADMINISTRATOR OF THE ESTATE OF
MINNIE BURSAW, DECEASED v. HENRY PLENCE.¹

January 16, 1920.

No. 21,594.

Death by wrongful act — evidence of reckless driving.

In an action for the wrongful death of plaintiff's intestate, caused by being run over by an automobile negligently operated by defendant, the evidence is *held* to support the verdict, and that there was no reversible error in the rulings of the court in the admission or exclusion of evidence.

Action in the district court for Martin county to recover \$7,500 for the death of plaintiff's intestate. The case was tried before Dean, J., and a jury which returned a verdict for \$2,000. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Paul C. Cooper and C. F. Gaarenstroom, for appellant.

Haycraft & McCune, for respondent.

BROWN, C. J.

Action for the death of plaintiff's intestate alleged to have been caused by the negligence of defendant. Plaintiff had a verdict and defendant appealed from an order denying a new trial.

Decedent and her husband were driving a team of horses hitched to a two seated buggy along one of the streets of the city of Fairmont. The horses became unmanageable and ran away. To protect herself from injury that might result from the runaway if she remained in the buggy, decedent jumped therefrom to the street, as a result of which she suffered some injury, the exact nature of which the evidence does not clearly disclose. Within a moment or two thereafter an automobile weighing 3,500 pounds owned and driven by defendant came down the same street, ran over decedent as she lay on the pavement, crushing her skull and carrying a piece thereof with attached brain matter a distance of about 30 feet from the body.

¹Reported in 175 N. W. 1004.

Two questions are presented by the assignments of error: (1) Whether the verdict for plaintiff is supported by sufficient evidence; and (2) whether the trial court erred in its rulings on the admission or exclusion of evidence. Neither question requires extended discussion.

The evidence makes it clear that defendant, on the occasion in question, ran his car down the street in a reckless and negligent manner, and without due regard to the safety of others. A person who was aware of the presence of decedent lying prostrate on the street made every effort to cause him to stop his car, and though aware of such efforts defendant failed to heed them, with the result stated. That his car, at least one wheel thereof, passed over decedent's head is also established with reasonable certainty; those present at the time traced the tracks of the car to and over the same, and in our view of the evidence the fact is not open to serious question.

The contention that decedent was killed by jumping from the buggy, and not by the automobile, is not sustained by the record. We find no basis for that conclusion other than the opinion of plaintiff, expressed to witness Krause soon after the accident. Plaintiff denied making the statement, but if made was only his opinion, based wholly upon her act in jumping from the buggy, and clearly not conclusive that she thus met her death. He was greatly disturbed at the time, suffering intense grief, and his opinion is of no greater force than that of any other person, based upon the same fact. *O'Connor v. Modern Woodmen of America*, 110 Minn. 18, 124 N. W. 454, 25 L.R.A. (N.S.) 1244. It is not probable that instant death resulted from her act in jumping from the buggy. The evidence makes it clear that her head was crushed by the automobile, leaving that as the natural cause of death, for there was no other serious injury to her body. And moreover there was evidence that decedent was alive immediately before she was struck by the automobile, and was calling for her husband; her calls ceased after it had passed. The reliability of that evidence was for the jury and court below, and, taking the record as a whole, without further enlargement on the facts, our conclusion is that the death of decedent was sufficiently shown to have been caused by the automobile. On the facts disclosed the burden to prove to the contrary was on the defendant.

We have examined the assignments challenging the rulings of the court

on the admission and exclusion of evidence and find no error of a character to justify a new trial.

Order affirmed.

FRANK PRINZ v. E. LUTHER MELIN AND OTHERS.¹

October 24, 1919.

No. 21,352.

Action on appeal — striking out sham answer.

Action against the sureties on an appeal bond. The answer of defendant in another action was stricken out and judgment ordered in favor of plaintiff. Defendant appealed from the order striking out the answer and for judgment. The appeal was dismissed by the appellate court and judgment entered therein for costs, which the appellant paid. This action was against the sureties on the appeal bond to recover the amount of the judgment in the trial court. Their answers were general denials, and the trial court made an order striking them out as sham. Defendants appealed from that order. The condition of the appeal bond did not provide for the payment of the judgment in the trial court in case of a dismissal of the appeal. The bond was set out in the complaint. The only effect of the answers was to raise an issue as to whether such judgment had ever been entered, although it was of record in the court where the action was pending. The liability of defendants could have been determined upon a motion for judgment. *Held*: The answers were properly stricken out.

Action in the municipal court of Minneapolis. From an order, Bardwell, J., granting plaintiff's motion to strike out the answers of defendants as sham, defendants appealed. Affirmed.

E. Luther Melin and *D. Theodore Melin*, for appellants.

Lawrence F. Fagerstrom, for respondent.

PER CURIAM.

In a former action by plaintiff against Melin Bros. Incorporated, in the municipal court of the city of Minneapolis, the court made an order striking out the answer as sham and ordering judgment in favor of the plaintiff. Judgment was accordingly entered, a transcript thereof filed in the district court of Hennepin county, execution thereon issued and returned wholly unsatisfied. About four months after the entry of judgment, defendant appealed from the order striking out the answer and for judgment. Upon such appeal a bond was given, which the defendants in the present action signed as sureties, conditioned "to pay the costs of said appeal and damages sustained by the respondent in consequence thereof, if said order or

¹Reported in 174 N. W. 412.

any part thereof shall be affirmed and the appeal dismissed and to abide and satisfy the judgment or order of which the appellate court may give therein, and if the order appealed from is reversed this obligation shall be void." The appeal was dismissed by the appellate court. Judgment was entered in the supreme court for costs and the same was paid by the appellant therein.

The present action was brought against the defendants as sureties upon such appeal bond, to recover the amount of the judgment in the former action. The defendants interposed separate answers in the form of general denials. The court below, upon motion, made an order striking out the answers as sham. This is an appeal from such order.

It will be observed that the condition of the appeal bond in question does not provide for the payment of the judgment in the court below in case of a dismissal of the appeal. It is conditioned that if the appeal is dismissed appellant will abide and satisfy the judgment or order of the appellate court. The judgment for costs in the appellate court was paid and satisfied by the appellant therein. The only effect of the answers was to raise an issue as to whether such a judgment had ever been recovered by respondent, though it had been rendered and was of record before the court where this action was then pending. The bond is set forth in the complaint. Defendants' liability could have been determined upon a motion for judgment. The answers were properly stricken out.

Affirmed.

THOMAS WATSON v. C. M. PADGETT AND ANOTHER
(3 CASES).

GUS SWARTZ v. SAME.

T. P. SHELDON v. SAME.
(9 CASES)

FLOYD FLEX v. SAME.¹

G. W. LIND, APPELLANT IN EACH CASE.²

November 14, 1919.

Nos. 21,406, 21,407, 21,408, 21,414, 21,416, 21,417, 21,418, 21,419, 21,420, 21,421,
21,424, 21,425, 21,426.

November 28, 1919.

No. 21,427.

¹Reported in 174 N. W. 829.

²Other cases on these time checks were brought by Otto Anderson (2

Case followed.

Action in the district court for Koochiching county to foreclose mechanic's liens upon certain logs and timber products. The case was tried before McClenahan, J., who made findings, ordered judgment in favor of plaintiffs, declared the judgments to be specific liens upon the logs and timber, and ordered the property be sold to satisfy the liens. From the judgments entered pursuant to the order for judgment, defendant G. W. Lind appealed. **Affirmed.**

S. H. Eckman, for appellant.

J. H. Brown, for respondent.

PER CURIAM.

These are cases referred to in *Sheldon v. Padgett*, supra, page 141, 174 N. W. 827. The same proceedings were had and substantially the same facts found, except that the names and amounts were different, and in the *Sheldon* case there were full formal assignments of the claims attached to the statement filed in the office of the surveyor general and the original indorsed time checks were attached to the statement filed in the clerk's office, and in the *Swartz* case plaintiff was the original holder of the time check and there was no assignment. We hold, following conclusions reached in that case, that the judgment herein appealed from should be sustained.

Affirmed.

Brown, C. J., took no part in these cases.

STATE EX REL. THEODORE QUALE v. GUY A. PENNEY.¹

November 21, 1919.

No. 21,550.

Appeal from order upon motion for judgment upon pleadings dismissed.

In ordinary actions no appeal lies from an order granting or denying a motion for judgment upon pleadings. The same rule *held* to govern when application is made for a writ of mandamus. [Reporter.]

cases), William McDonald, E. G. Carter, John Glava (2 cases), M. J. Rowen (5 cases), Cora Anderson, W. E. Rose, A. Gottschalk and Harvey Baker against the same defendants as in the principal case. The court files for these cases begin with 21,403 and end with 21,431. These are some of the 29 cases mentioned in the second paragraph of the opinion on page 142 supra. [Reporter.]

¹Reported in 174 N. W. 611.

Upon the relation of Theo. Quale the district court for Pennington county granted its alternative writ of mandamus directed to Guy A. Penney, as mayor of the city of Thief River Falls, directing him to sign warrants issued by the city clerk of that city to petitioner in payment of his salary as city attorney for the months of January, February and March, 1919, and permit the same to be delivered to petitioner, or show cause why he had not done so. From an order, Grindeland, J., granting respondent's motion for judgment upon the pleadings, denying a peremptory writ and dismissing the petition and alternative writ, petitioner appealed. Appeal dismissed.

C. G. Dosland, O. A. Naplin and Theo. Quale, for appellant.

E. M. Stanton, for respondent.

PER CURIAM.

The respondent in this a mandamus proceeding moved for judgment on the pleadings. The court filed an order granting the motion and directing judgment to be entered accordingly. Relator appeals from the order. No judgment has been entered. The order is not appealable. In ordinary actions no appeal lies from an order granting or denying a motion for judgment on the pleadings. It is not perceived why a different rule should obtain as to like orders in mandamus proceedings.

The appeal is dismissed.

GOLDALE LIQUOR COMPANY v. O. BAILYS.¹

November 28, 1919.

No. 21,473.

Action on promissory note — finding supported by evidence.

Action in the municipal court of Minneapolis to recover \$600 on a promissory note. The case was tried before Charles L. Smith, J., who made findings and ordered judgment for the amount demanded. From an order denying his motion for a new trial, defendant appealed. Affirmed.

George R. Smith, H. Stanley Hanson and Leo J. Gleason, for appellant.
Jonas Weil, for respondent.

PER CURIAM.

The only question involved on this appeal is whether the findings of the trial court are sustained by the evidence. The action is upon a promissory

¹Reported in 174 N. W. 821.

note. Defendant interposed in defense an agreement between the parties by which defendant agreed to transfer to plaintiffs his saloon business with stock and fixtures in full discharge of the note; that plaintiffs agreed to accept the same. It appears that the agreement was made, but the trial court found as a fact that it was never carried out or performed by the parties, and by mutual consent was subsequently rescinded. Our examination of the record discloses sufficient evidence to support the findings.

The record presents no reversible error and the order appealed from is affirmed.

JOSEPH SCHRANKEL v. MINNEAPOLIS STREET RAILWAY
COMPANY.

ALTA SCHRANKEL v. MINNEAPOLIS STREET RAILWAY
COMPANY.¹

December 5, 1919.

Nos. 21,545, 21,546.

Negligence.

One of defendant's street cars going north passed plaintiff and he then turned his motor to the west and started to cross defendant's street car tracks when he was struck by a car going south and injured. At the close of the evidence the court dismissed the case. *Held*: No error. [Reporter.]

Two actions in the district court for Hennepin county, the first to recover \$4,150 and the second to recover \$3,000. The cases were tried together before Jelley, J., who when plaintiffs rested granted defendant's motion to dismiss in each action on the ground that they had failed to make out a cause of action against defendant, in that they had shown no negligence on his part and that the evidence conclusively showed that plaintiff was guilty of negligence as a matter of law. From orders denying motions for a new trial, plaintiffs appealed. Affirmed.

Brady, Robertson & Bonner, for appellants.

R. T. Boardman and *W. D. Dwyer*, for respondent.

PER CURIAM.

These two actions involve the same facts and were consolidated and tried together. There was a dismissal at the close of the evidence, and plaintiffs appealed from an order denying a new trial.

¹Reported in 174 N. W. 820.

Plaintiff, accompanied by his coplaintiff, his wife, was driving his automobile along Washington avenue in the city of Minneapolis, in a northerly direction, a street car following closely behind. A gasoline filling station is located on the west side of the avenue at the intersection of Ninth Avenue North. As plaintiff approached that avenue he slowed down, with a view, when the street car passed him, of crossing the street to the filling station for a supply of gasoline. He stopped his automobile at about the north line of Ninth avenue to permit the street car to pass and as it did so plaintiff started across the street in the rear thereof and in the direction of the filling station. He was almost immediately struck by a street car coming from the north on the opposite street car track. The street car which passed plaintiff did not stop to take on or discharge passengers.

In our view of the record the trial court properly dismissed the action for want of actionable negligence against defendant. There was no evidence, circumstantial or otherwise, of excessive speed of the street car, and no sufficient evidence that the usual signals were not given of its approach. Plaintiff alone testified that he heard no signals. No other witness testified upon the point. And, moreover, it is clear that under the facts presented no particular signal was necessary. The accident occurred in mid-day, and when plaintiff slowed down and stopped his automobile the street car was a few feet distant and coming toward him on the opposite street-car track. Plaintiff must have seen it approaching; if he did not it was because of a failure on his part to exercise a proper degree of care for his own protection. A signal at the time would have been of no benefit, and would have added nothing to the situation which was plainly in the view of both plaintiff and his wife. *Medcalf v. St. Paul City Ry. Co.* 82 Minn. 18, 84 N. W. 633.

Order affirmed.

NORTHWESTERN MARBLE & TILE COMPANY v. OLOF
SWENSON.¹

December 19, 1919.

No. 21,510.

Construction of building contract — verdict sustained.

Conflicting evidence whether contract required plaintiff to do certain tile work on a roof. Verdict for defendant. *Held*: The verdict must be sustained, because it is not clearly against the evidence and has been approved by the trial court. [Reporter.]

¹Reported in 175 N. W. 99.

Action in the district court for Ramsey county to recover \$2,657 for material and labor furnished in construction of a building for the University of Minnesota. The answer interposed a counterclaim for \$1,400. The case was tried before Haupt, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict in favor of defendant. From an order denying its motion for a new trial, plaintiff appealed. Affirmed.

A. B. Darelius, for appellant.

Kueffner & Marks, for respondent.

PER CURIAM.

The principal question presented on this appeal is whether the verdict of the jury is clearly against the evidence. The controversy in the case centered around the terms of the building contract involved in the action, and whether plaintiff was thereby obligated to do a certain part of the tile work on the roof of the building, plaintiff insisting that the contract did not impose the particular work upon it, while defendant contended to the contrary. The terms of the contract were not clear, and extrinsic evidence was presented by both parties. It was conflicting and presented a question of fact for the jury. The verdict is not clearly against the evidence, and must be sustained since it has been approved by the trial court. There were no errors in the admission or exclusion of evidence of a character to justify a new trial.

Order affirmed.

Holt, J., took no part.

ARTHUR DE VRIENDT v. CHICAGO GREAT WESTERN
RAILROAD COMPANY.¹

December 19, 1919.

No. 21,540.

Accident at street crossing — negligence and contributory negligence — evidence.

1. Action for injury to plaintiff's automobile at a street crossing. Evidence that on a very dark night defendant backed its engine over the crossing with neither light nor lookout on the tender, and that buildings and the engine and tender may have obstructed plaintiff's view so that he could not

¹Reported in 175 N. W. 99.

see the rays of light from the headlight or the lights in the cab and hood of the engine. *Held*: The evidence of defendant's negligence was ample and that of defendant's contributory negligence was a question for the jury. [Reporter.]

Charge to jury.

2. Objectionable clauses in the charge to the jury were cured by later portions of the charge. [Reporter.]

Action in the district court for Mower county to recover \$600 for injuries to an automobile. The defense was contributory negligence on the part of plaintiff. The case was tried before Dean, J., acting for the judge of the Seventeenth judicial district, who when plaintiff rested denied defendant's motion to dismiss the action and at the close of the testimony its motion for a directed verdict, and a jury which returned a verdict for \$300. Defendant's motion for judgment notwithstanding the verdict or for a new trial was denied. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

A. G. Briggs, Charles H. Weyl and J. N. Nichol森, for appellant.
Sasse & French, for respondent.

PER CURIAM.

Action for damages to plaintiff's automobile, which was struck by one of defendant's engines at a street crossing on the night of February 26, 1918. The evidence of negligence on the part of defendant was ample. It backed this engine with the tender in advance over this crossing on a very dark night with neither light nor lookout on the tender to give warning of its approach. The evidence made the question of plaintiff's contributory negligence a question for the jury. Buildings along the track obstructed plaintiff's view in the direction from which the engine approached, until he was within a short distance of the track. He testified that owing to the slushy and slippery condition of the road he had his machine in the low gear and was running five or six miles an hour, and that as he approached the track he looked and listened, but neither saw nor heard the engine approaching until it struck his machine.

This is not a case where the court can say that, if plaintiff had looked as he claimed, he must have seen the engine, for the night was cloudy and dark, there was no light on the tender, and, while the headlight on the engine was lighted, its rays were not thrown toward plaintiff, but in the opposite direction, and the buildings and the engine and tender may have so obstructed his view that he was unable to see these rays of light or the lights in the cab and hood of the engine.

We find no error in the refusal of the court to give certain of defendant's

requested instructions. The request in respect to minimizing damages does not state the rule correctly. While portions of the charge, if they stood alone, would be objectionable, later portions of the charge applied the correct rules, and we think that the charge as a whole did not tend to mislead the jury and that no errors occurred which justify a reversal. The order denying a new trial is affirmed.

HERBERT A. KENNISON v. LAWRENCE H. LUCKER AND
ANOTHER.¹

December 19, 1919.

No. 21,571.

Architect's fee — findings sustained.

Action for architect's fee for preparation of plans and specifications for a residence. Conflicting evidence. Finding in favor of plaintiff. *Held*: The finding was not clearly against the evidence. [Reporter.]

Action in the district court for Hennepin county to recover \$640, and foreclose a mechanic's lien for the same. The facts are stated in the opinion. The case was tried before Fish, J., who made findings and ordered judgment in favor of plaintiff for the amount demanded, together with an attorney's fee of \$100; that the amount be made a specific lien upon the premises, and that they be sold to satisfy the lien. From an order overruling their motion for amended findings and conclusions of law or for a new trial, defendants appealed. Affirmed.

Louis A. Hubachek and Louis H. Joss, for appellants.

Hoke, Kruse & Faegre, for respondent.

PER CURIAM.

The only question presented in this case is whether the findings of the trial court are clearly and manifestly against the evidence. We are unable to say that they are, and the order appealed from must be affirmed. Plaintiff's claim is that, at the instance and request of defendants, he prepared certain plans and specifications for a residence which they contemplated constructing in the city of Minneapolis, for which they agreed to pay him an amount equal to four per cent of the cost of construction. The defense in substance was that the plans and specifications were prepared by plain-

¹Reported in 175 N. W. 1007.

tiff on the express understanding that defendants were to pay nothing therefor unless they were acceptable and were used; that they were not acceptable and were not used. The court found that the defense thus alleged was not sustained by the evidence. Our conclusion is that the finding is not clearly against the evidence.

Order affirmed.

ERNEST JOHANSON v. LUNDIN BROS. AND ANOTHER.
IVAN BOWEN, PETITIONER.¹

December 19, 1919.

No. 21,663.

Workmen's Compensation Act — attorney's fees.

Application by attorney for allowance of his fees for services rendered a disabled workman who received \$231 in all from his employer, disallowed, because such fees cannot be recovered under the Workmen's Compensation Act. [Reporter.]

Upon the relation of Ivan Bowen the supreme court granted its writ of certiorari directed to the Honorable W. L. Comstock, judge of the district court for Blue Earth county, and others, to review an order denying the petition of relator for recovery of his attorney fees in proceedings in that court brought under the Workmen's Compensation Act by Ernest Johanson, employee, against Lundin Brothers and others, employers and insurers. Affirmed.

LeRoy Bowen, for petitioner.

L. N. Foster and *E. N. Ellingson*, for respondents.

PER CURIAM.

The only question presented for review in this proceeding is, whether the relator is entitled to recover attorney's fees under the provisions of the Workmen's Compensation Act. Chapter 84A, G. S. 1913.

The act, section 8225, of the statute provides: "Costs may be awarded by said judge in his discretion, and when so awarded the same costs shall be allowed, taxed and collected as are allowed, taxed and collected for like services and proceedings in civil cases."

Attorney's fees are not allowed in ordinary civil actions, and can be allowed only when authorized by statute. *Schmoll v. Lucht*, 106 Minn. 188,

¹Reported in 175 N. W. 302.

118 N. W. 555; State v. District Court of St. Louis County, 129 Minn. 423, 152 N. W. 838.

Johanson was injured while in the employ of Lundin Brothers in September, 1916. In October they entered into a stipulation, whereby it was agreed that Johanson should receive \$11 per week during his disability as compensation. This settlement was approved by the judge of the district court and filed with the clerk. Payments were made thereon up to March 6, 1917, when the respondents refused to make further payments, on the ground that Johanson had fully recovered. The relator had been employed as Johanson's attorney, and, after considerable correspondence, filed a petition with the district court and procured an order to show cause, which was served upon the respondents. The time for hearing thereon was set by order of the court for May 25, at which time the respondents appeared and produced a receipt dated April 20, 1917, and signed by Johanson, stating that he had received the sum of \$22 as the final payment of compensation for his injury, making in all the sum of \$231, in consideration of which he had released and forever discharged the respondents from liability. The relator then asked leave of the court to carry on the action and file an application for attorney's fees. The request was granted and relator filed his application. Thereafter such proceedings were had that the court made an order disallowing the application, upon the ground that he was not entitled to recover attorney's fees under the Workmen's Compensation Act. The case comes to this court by certiorari.

The order of the trial court is affirmed.

E. L. WELCH COMPANY v. CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY.¹

December 26, 1919.

No. 21,520.

Carrier — presentation of claim by shipper — waiver of right by carrier.

The clause in the uniform bill of lading limiting the time within which a claim against the carrier in case of loss of shipment may be made, may be waived by the carrier. [Reporter.]

Action in the district court for Hennepin county to recover \$1,378.60 for the conversion of a carload of oats. The amended answer set up as a

¹Reported in 175 N. W. 100.

defense the provision in the uniform bill of lading, under which the shipment was made, that "claims for loss, damage or delay, must be made in writing to the carrier at point of delivery, or at point of origin, within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable," and alleged that no claim was made within the time specified. The reply alleged that defendant fully waived that requirement. The case was tried before Hale, J., who at the close of the testimony granted defendant's motion for a directed verdict. From an order denying its motion for a new trial, plaintiff appealed. Reversed and new trial granted.

H. V. Mercer & Co. and Andrew N. Johnson, for appellant.

F. W. Root and Colin W. Wright, for respondent.

PER CURIAM.

On February 27, 1915, the Farmers' Co-operative Society shipped a car of oats from Alpha, Minnesota, over the defendant's line of railroad, under the usual uniform bill of lading, consigned to plaintiff at Minneapolis. The bill of lading contained the usual four months' limitation provision for making claim for loss in case the carrier failed to deliver the shipment. Plaintiff was a commission merchant at Minneapolis, received the bill of lading and paid the shipper for the oats in the usual course of business. The defendant failed to deliver the shipment. No claim for loss was made until May 17, 1916.

This action was brought on the theory of conversion, to recover the value of the car of oats. Defendant pleaded the limitation clause as a bar to plaintiff's right of recovery. The reply set up a waiver of the limitation clause. There was testimony in support of a waiver. At the close of the testimony the trial court directed a verdict for defendant, upon the theory that the defendant could not waive the limitation clause as it would be contrary to the statutes of the state. A majority of the court are of the opinion that the trial court was in error. The rule is no longer an open question in this state. The carrier may waive the provisions of such limitation clause. *Robinson v. Great Northern Ry. Co.* 123 Minn. 495, 144 N. W. 220; *Naumen v. Great Northern Ry. Co.* 131 Minn. 217, 154 N. W. 1076; *Shama v. Chicago, M. & St. P. Ry. Co.* 128 Minn. 522, 151 N. W. 406; *Ferris v. M. & St. L. R. Co.* 143 Minn. 90, 173 N. W. 178.

The order denying plaintiff's motion for a new trial is reversed and a new trial granted.

STATE EX REL. E. M. HELLNER v. ALBERT WUNDERLICH,
AS COMMISSIONER OF EDUCATION OF THE CITY
OF ST. PAUL AND ANOTHER.¹

January 2, 1920.

No. 21,488.

Case followed.

Upon the application of relator the district court for Ramsey county granted its writ of alternative mandamus directing the commissioner of education of the city of St. Paul to reinstate relator in her position as teacher in the public schools of that city and to place relator's name upon the payroll of the city, or show cause why he had not done so. Respondents separately demurred to the petition and writ on the ground that they did not state facts sufficient to entitle relator to the relief demanded. From an order, Haupt, J., sustaining demurrers to the alternative writ of mandamus, plaintiff appealed. Affirmed.

J. P. Kyle, for appellant.

O. H. O'Neill and *W. J. Giberson*, for respondents.

PER CURIAM.

This case in all substantial respects is similar to the case of *State v. Wunderlich*, supra, page 368, 175 N. W. 677, and the questions involved are disposed of by the opinion in that case.

Order affirmed.

A. P. NEWMAN v. FLOUR CITY FUEL & TRANSFER
COMPANY.²

January 2, 1920.

No. 21,541.

Case followed.

Action in the municipal court of Minneapolis to recover \$525, the value of an automobile. The defense set up in the answer was that the storage of automobiles was accepted only on condition defendant would not be re-

¹Reported in 175 N. W. 690. ²Reported in 175 N. W. 632.

sponsible for their loss by fire or theft. The case was tried before Charles L. Smith, J., who at the close of the testimony denied motions by both parties for directed verdicts, and a jury which returned a verdict for \$530. From an order denying its motion for judgment notwithstanding the verdict or for a new trial in case plaintiff consented to a reduction of the verdict to \$525, defendant appealed. Affirmed.

Adolph E. L. Johnson, for appellant.

G. A. Will, for respondent.

PER CURIAM.

This case and the case of Steenson against the same defendant, *supra*, page 375, 175 N. W. 681, were tried together before the same jury. The facts in the two cases were identical, except that Steenson's automobile was worth slightly more than Newman's and this case is affirmed under the opinion filed in that case.

Affirmed.

COCHRAN-SARGENT COMPANY v. WALTER FOOTE AND ANOTHER, COPARTNERS AS FOOTE & HAGENSON.¹

January 2, 1920.

No. 21,565.

Pleading — striking out sham answer.

Action for goods sold and delivered, the complaint alleging that defendants were indebted to plaintiff. Answer was a general denial. Motion to strike out the answer as sham, supported by affidavits that one of defendants had exhibited to plaintiff's treasurer a list of defendants' creditors, showing the amount owed to each, in which plaintiff's debt was shown to be slightly greater than that claimed by the complaint. The counter affidavit of one of the defendants stated that the list was prepared by their book-keeper, had not been checked, and they did not admit its correctness; that defendants' attorney advised them they had a good defense to the action, "or at least to a portion thereof." *Held*: The court did not err in striking out the answer as sham. [Reporter.]

Action in the district court for Wabasha county to recover \$326.21 for goods sold and delivered. From an order, Callaghan, J., striking out defendants' answer as sham, they appealed. Affirmed.

¹Reported in 175 N. W. 538.

George H. Hammond, for appellants.

Kinney & Phillips, for respondents.

PER CURIAM.

Appeal from an order striking out defendants' answer as sham.

Plaintiff sued to recover for goods sold and delivered, alleging that defendants were indebted to it on account thereof. The answer was a general denial. Plaintiff moved to strike out the answer as sham, supporting the motion with affidavits. It appeared from the affidavits that, shortly before they were sued, one of the defendants had exhibited to plaintiff's treasurer a list of creditors, showing the amount owing by defendants to each creditor, and had represented that they were having difficulty in paying their indebtedness, and proposed to make monthly payments if their creditors would grant them an extension. Plaintiff's claim was listed at an amount slightly in excess of the amount claimed in its complaint. It also appeared that at another time and place both of the defendants had exhibited the same or a similar list of creditors to another person with a like request, and that it contained the same entry as respects plaintiff's claim.

Defendants filed an affidavit made by one of them, stating that their attorney had advised them that they had a good defense to the action, "or at least to a portion thereof." It was further stated that the list referred to in the affidavits offered by plaintiff was prepared by defendants' bookkeeper and that they had not checked it over and did not admit its correctness. The order striking out the answer provided that defendants, if so advised, might serve and file an amended answer. Within the rule stated in *Towne v. Dunn*, 118 Minn. 143, 136 N. W. 562, the trial court was justified in striking out the answer as sham. Order affirmed.

NELLIE HOLLAND v. YELLOW CAB COMPANY, INC.¹

January 9, 1920.

No. 21,499.

Appeal and error — verdict on contradictory evidence not reversible.

1. Contradictory evidence as to the respective speeds at which a taxicab and a touring car approached the intersection of two streets where they met in collision. Same number of witnesses of the collision for each party. Verdict for plaintiff approved by trial court. Held: An appellate court has no right to vacate the verdict under such circumstances. [Reporter.]

¹Reported in 175 N. W. 536.

Appeal and error — damages not excessive.

2. Where the injury is to the sacro-iliac joint and affects locomotion and the jury had opportunity to note the physical appearance and movements of plaintiff at the trial, the judgment of the jurors and trial court will not be reversed on appeal, even if plaintiff did engage in dancing a few months after the injury. [Reporter.]

Contributory negligence of guest of driver — exceeding statutory speed.

3. A person riding in a touring car at the invitation of the owner along wide, level, paved and dry streets at an hour of the evening when there is comparatively little driving on down town streets, who was not driving and had no control over the driver, is not guilty of contributory negligence, as a matter of law, if the driver collides with another car, because she rode for several blocks at a speed of 15 or 20 miles an hour, without making any protest. Section 2635, G. S. 1913, as amended, does not make a speed of more than ten miles an hour conclusive of negligence or excessive speed. [Reporter.]

Action in the district court for Hennepin county to recover \$15,000 for personal injuries. The answer alleged that plaintiff's injury was due solely to the carelessness and negligence of the driver of the car in which she was riding. The case was tried before Jelley, J., who when plaintiff rested denied defendant's motion to dismiss the action and at the close of the testimony its motion for a directed verdict, and a jury which returned a verdict for \$2,750. Defendant's motion for judgment notwithstanding the verdict was denied and its motion for a new trial was denied on condition plaintiff consented to a reduction of the verdict to \$2,000. From the order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

L. O. Rue, for appellant.

John O. Loeffler and *William A. Tautges*, for respondent.

PER CURIAM.

A taxicab going east on Eleventh street in the city of Minneapolis and a touring car going north on Marquette avenue collided where these two streets intersect at right angles. Plaintiff was seated in the rear seat of the touring car, and claims to have wrenched her back from the jolt of the collision. The jury awarded her damages, and defendant, the owner of the taxicab, appeals from the order denying a new trial. The witnesses for plaintiff testified that the taxicab was approaching the intersection at about twice the speed the touring car was approaching it, and that the touring car

passed the south line of Eleventh street when the taxicab was some 30 or 40 feet west of the west line of Marquette avenue. The witnesses for defendant testify to exactly the reverse as to the relative speed and position of the two cars as they entered or approached the intersection. There were four witnesses on each side as to the occurrence of the collision. It is clear that upon such conflicting testimony this court has no right to vacate the verdict, finding defendant negligent and plaintiff free from negligence, approved as it is by the trial court.

Nor can we say that the damages, as reduced, are excessive. The injury is located by plaintiff and her medical experts in the sacro-iliac joint, a part of the human anatomy sufficiently obscure in its functioning to have given rise, of late, for a workable combination between a plaintiff's subjective symptoms and medical experts' opinions to draw large verdicts from jurors. And in this case, it might well be doubted that plaintiff was injured as and to the extent claimed by her from the fact that, within a few months after the injury, she participated in such vigorous exercise as dancing, for we understand that an injury to this joint affects locomotion. But, after all, we must, on the question of such injuries and compensation therefor, defer to the judgment of the jurors and the trial court who in addition to knowledge of this dancing episode had also the opportunity to note the physical appearance and movements of plaintiff during the trial.

We cannot sustain defendant's claim that plaintiff's negligence appeared, as a matter of law, from her admission that she rode as an invitee of the owner of the touring car at a speed of from 15 to 20 miles an hour for several blocks, without protesting, immediately before the collision occurred.

It is said this was within a city district where section 2635, G. S. 1913, as amended, makes a greater speed than ten miles an hour unreasonable and negligent. Plaintiff was not driving and had no control over the driver. The touring car was being driven along wide, level, paved and dry streets at a time in the evening when there was comparatively little driving on down town streets. The statute does not say that a speed of more than ten miles per hour shall be conclusive of negligent or excessive speed; it is only made prima facie evidence that it is greater than is reasonable or proper. And we do not think that a person riding with one going at a speed of 20 miles an hour, under the conditions existing at the time in question, can be held, as a matter of law, to be guilty of contributory negligence if the driver collides with another car.

Order affirmed.

JOHN N. OFFERMAN v. YELLOW CAB COMPANY, INC.¹

January 9, 1920.

No. 21,606.

Negligence of cab driver — contributory negligence — damages.

Late at night plaintiff walked south along the west side of Washington avenue in Minneapolis and crossed to the south curb of Fourth avenue which crosses Washington avenue at right angles. He then turned around and started back toward the north curb of Fourth avenue. After turning he saw defendant's cab on Washington avenue, 30 feet north of the street intersection, proceeding south. He did not look again and did not hear any warning signal until he was struck by it. The driver claimed he sounded his horn as he approached the corner. *Held:*

(1) The evidence made the questions of defendant's negligence and plaintiff's contributory negligence for the jury. The court cannot say as a matter of law that plaintiff, hearing no warning as he testified, was negligent in assuming that the cab would continue in the direction it was going when he saw it.

(2) As the cab was not coming toward plaintiff when he saw it and he did not see it after it turned in his direction, it does not follow that failing to sound the horn was not the proximate cause of the accident. The court did not err in charging the jury that, if the driver failed to sound his horn on approaching plaintiff, he was chargeable with negligence in failing to comply with this statutory requirement.

(3) The verdict of \$1,200 was not excessive. [Reporter.]

Action in the district court for Hennepin county to recover \$10,000 for personal injuries. The answer alleged that the collision between plaintiff and defendant's taxicab was due solely to plaintiff's carelessness and negligence. The case was tried before Steele, J., who when plaintiff rested denied defendant's motion to dismiss the action and at the close of the testimony its motion for a directed verdict, and a jury which returned a verdict for \$1,200. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. *Affirmed.*

L. O. Rue, for appellant.

Tautges, Bruce, Bissell & Wilder, for respondent.

¹Reported in 175 N. W. 537.

PER CURIAM.

Plaintiff recovered a verdict for personal injuries sustained in a collision with one of defendant's taxicabs at a street intersection in the city of Minneapolis, and defendant appealed from an order denying its alternative motion for judgment or for a new trial.

Washington avenue and Fourth Avenue South intersect at right angles. Late at night on October 26, 1918, plaintiff walked south along the west side of Washington avenue until he reached the curb on the south side of Fourth avenue and then turned around and started back toward the sidewalk on the north side of Fourth avenue. After turning back he saw defendant's cab on Washington avenue about 30 feet north of the street intersection. It was then proceeding south on Washington avenue. He did not look again and did not hear any warning signal and did not know that the cab had turned into Fourth avenue until it struck him. This in substance is plaintiff's account of how the accident happened. Defendant's driver gave a different account of it, and stated that he sounded his horn as he approached the corner. We think the evidence made a question for the jury as to defendant's negligence and also as to plaintiff's contributory negligence. If the cab had continued in the course in which it was going when plaintiff saw it, the collision could not have occurred. If the driver turned so as to approach plaintiff, the statute made it his duty to give warning by sounding his horn. We cannot say as a matter of law that plaintiff, hearing no warning as he testified, was negligent in assuming that the cab would continue in the direction in which it was going when he saw it.

Defendant contends that the court erred in instructing the jury that, if the driver failed to sound his horn on approaching plaintiff, he was chargeable with negligence for failing to comply with this statutory requirement. Defendant argues that, as plaintiff saw the cab, he had all the warning that a signal would have given, and that failing to sound the horn could not have been the proximate cause of the accident. This might be true if the cab had been coming toward plaintiff when he saw it, but it was not, according to his testimony, and he did not see it after it turned in his direction.

Defendant also contends that the verdict is excessive. Although inclining to the opinion that plaintiff did not sustain a very serious injury, we are unable to say that the amount of the verdict is so disproportionate to the injury, which the jury may have found that he sustained, as to justify this court in interfering with it after it has been approved by the trial court.

Order affirmed.

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ABATEMENT AND REVIVAL.

A prior action brought on the policy by plaintiff's husband in which he asserted ownership of the property, she not being a party to the action and not having authorized her husband to bring it, did not estop her from maintaining an action for the reformation of the policy and a recovery thereon in her own right, the husband's action having been dismissed without a trial prior to the trial of her action.

—Sundin v. County Fire Insurance Co. of Philadelphia, 101.

ACCESSORY.

Before the Fact. See Criminal Law, 4.

ACCOMPLICE. See Criminal Law, 3-7.

ACCORD AND SATISFACTION.

By Cropper, without Knowledge of Creditor.

The fact that defendant in making division of a crop added to plaintiff's share, without his knowledge, an additional quantity to satisfy a liability to him, did not constitute an accord and satisfaction of such liability.

—Brekken v. Wenzel, 218.

ACCOUNTING. See Landlord and Tenant, 4.

Between Attorney and Client. See Attorney and Client, 3.

Where the settled case contains only the charge of the court, an exception to the part of the charge questioned, and less than two pages of the testimony of defendant, the statement of the court in the charge that the action is "practically in the nature of an accounting," will be taken for granted by the court, there being an entire absence in the record of any showing to the contrary, that the action was so tried as to warrant the statement of the judge.

—Brekken v. Wenzel, 219.

ACCOUNT STATED.

1. Where a debtor receives a statement of account and not only retains it for some months without questioning its correctness but

ACCOUNT STATED—Continued.

also promises to pay it, he gives it the standing of an account stated which is assailable only for fraud or mistake.

—Kenyon Co. v. Johnson, 49.

2. An account stated having been established, and defendants having failed to present any competent evidence to prove their alleged offset, the court properly directed a verdict for plaintiff.

—Kenyon Co. v. Johnson, 49.

ADVERSE POSSESSION.**Must Be Openly Hostile.**

1. Adverse possession must be openly hostile. Divestiture of title by adverse possession rests upon proof or presumption of notice to the true owner of the hostile character of the possession.

—Beltz v. Buendiger, 52.

Possession of Tenant in Common Presumed Not to Be Hostile.

2. The possession of one tenant in common is presumed not to be hostile. Possession originating in a tenancy is presumably not hostile. Acts of occupation sufficient to show hostility as to strangers may not be sufficient as between near relatives. In all cases where the original occupation was permissive, the statute will not run until an adverse holding is declared and notice of such change is brought to the knowledge of the owner.

—Beltz v. Buendiger, 52.

Evidence of Beginning of Hostile Possession.

3. Proof of inception of hostility must in all such cases be clear and unequivocal. But it is not necessary that the assertion of title be expressly or affirmatively declared. This may be shown by circumstances.

—Beltz v. Buendiger, 52.

Finding Sustained.

4. Property in controversy consisted of a house and lot inherited by three sisters. It was exclusively occupied by one as a home for nearly 25 years. After her death her children occupied or rented it out for five years. These occupants paid the taxes for this whole period and made substantial improvements from time to time. The other sisters lived near by. They never asserted any right in the property, though not always on friendly terms. Held, the evidence sustains a finding of title by adverse possession.

—Beltz v. Buendiger, 53.

5. The presumption of permissive occupation is much stronger between parent and child than between estranged sisters. Cases between parent and child are in a place by themselves.

—Beltz v. Buendiger, 55.

AMBIGUITY.

Any Ambiguity in a Deed is to Be Resolved in Favor of Grantee. See Deed, 5.

AMENDMENT.

Of Answer at Trial. See Pleading, 2.

APARTMENT HOUSE.

Allegation of Fraud in Inducing Lease of Apartment House for the Term of 99 Years. See Pleading, 3.

Prohibition of Apartment Houses in Restricted Residence District in Cities of First Class. See Eminent Domain, 5—7.

When Gas Ranges and Door Beds Installed in Each Flat Pass as Fixtures to the Owner of Realty. See Fixture, 4.

APPEAL AND ERROR.

When Party Appealing from Order in Ditch Proceeding is Estopped from Questioning Prior Order. See Drain, 3.

Appeal Bond.

Not Necessary from a Municipal Corporation. See Bond.

When Appeal Can Be Taken.

1. An order requiring a pleading to be made more definite and certain, and directing that it be stricken out, unless the order is complied with, is appealable.

—Hart v. Lincoln National Life Insurance Co. 155.

When Appeal Cannot Be Taken.

2. In ordinary actions no appeal lies from an order granting or denying a motion for judgment upon pleadings. The same rule held to govern when application is made for a writ of mandamus.

—State ex rel. v. Penney, 463.

3. An order establishing a judicial ditch is not appealable and cannot be attacked on an appeal taken to review a reassessment of benefits and damages.

—Falkenhagen v. Counties of Yellow Medicine and Lac qui Parle, 257.

When Change of Theory is Permitted.

4. Defendants' theory at the trial having been rejected, they do not infringe the rule against shifting position by insisting that they are entitled to recover on the theory of the case adopted by the court.

—North Coast Lumber Co. v. Great Northern Lumber Co. 305, 308.

Failure to Make Objection in Trial Court.

5. The failure of one who is proceeding to foreclose a mechanic's lien to file a notice of lis pendens, as required by section 7030, G. S.

APPEAL AND ERROR—Continued.

1913, cannot be taken advantage of for the first time on appeal to this court.

—Carr-Cullen Co. v. Cooper, 380, 385.

6. Where no exception to rulings on the admission or exclusion of evidence was taken in the trial court, and the rulings were not assigned as error in the motion for a new trial, the rulings cannot be reviewed on appeal.

—Daigle v. Summit Mercantile Co. 179.

Failure to Ask for Separate Verdicts.

7. Where no request for separate verdicts is made, either as to compensatory or punitive damages, a defendant who did not actively participate in the assault cannot complain because he was jointly held with his codefendant for the entire amount of damages awarded.

—Daigle v. Summit Mercantile Co. 178.

Failure to Question Amount of Interest Included in Verdict.

8. The amount of interest included in the verdict, not having been questioned in the court below, cannot be questioned on appeal.

—County of Itasca v. Ralph, 447.

Failure to Request Instruction to Jury.

9. In Minnesota it is thoroughly settled that a failure to instruct on a particular phase presented by the evidence is not reversible error in the absence of a request to instruct thereon, or an objection, before the jury retires, apprising the court that an omission has been made in the charge which the party desires supplied.

—State v. Gaularpp, 88.

Assignment of Error.

Effect of Failure to Request Submission to Jury of Question Whether Defendant's Offense Was of Lesser Degree Than the One Named in Indictment and Verdict, or to Object to the Charge before Jury Retired. See Criminal Law, 15.

10. Error cannot be assigned in this court upon the instructions to the jury, unless exceptions are taken upon the trial or by a motion for a new trial.

—State Bank of Reading v. Ronan, 236.

11. On appeal from an order denying a new trial, a defendant will be held to have waived his right to assign as error an order overruling his demurrer to the complaint, where neither by answer nor at the trial by objection or motion did he challenge the sufficiency of the complaint on any of the grounds specified in his demurrer.

—Delasca v. Grimes, 67.

APPEAL AND ERROR—Continued.

Record. See Accounting.

Amendment of Notice of Appeal from Judgment in Justice Court. See Justice of Peace, 2, 4.

12. The supreme court is not permitted to consider statements as to what passed between court and counsel which are not incorporated in the settled case.

—State v. Gaularpp, 88.

Striking Out Abusive Brief.

13. Motion granted to strike from the files a so-called brief prepared by a landowner in a drainage case, because scurrilous and abusive.

—State ex rel. v. District Court of Stearns County, 80.

When Case Fails to Show that it Contains All the Evidence, Findings Conclusive.

14. Where the settled case fails to show that it contains all the evidence bearing on the matters presented for review, this court must take it for granted that the evidence justified the findings of fact and did not conclusively establish other facts not found.

—McCoy v. Grant, 92.

Right to Jury Trial Not Presented.

15. At the call of the term calendar the attorney for defendant stated the case was for the jury; plaintiff's attorney maintained it was a court case. Entry by clerk: "For trial. Court determines the above case was a court case." The record contains no further request, either for a jury trial or for submission of issues to the jury, or any objection to the court proceeding without a jury, or exception to the ruling of the court at the call of the calendar. Held: The question whether defendant was erroneously deprived of a jury trial was not presented by the record.

—Boyea v. Besch, 254, 256.

Change of Venue—Objectionable Practice.

16. The practice of obtaining a review of an order relating to the venue of an action by appealing from an order denying a new trial, or from a judgment, is not to be commended. If a reversal be had on that ground, the parties have been put to the expense of a trial on the merits which has accomplished nothing.

—Delasca v. Grimes, 69.

When Supreme Court Will Decide Question Not Passed on by Trial Court.

17. Where no question of fact is involved, and no appeal is made to discretion, and the question is purely one of law, this court may, with

APPEAL AND ERROR—Continued.

consent of all parties, determine a question not passed on by the trial court.

—Heffelfinger v. Appleton, 209.

Memorandum of Trial Judge Consulted.

18. A memorandum by the trial judge, filed with the findings, may be considered for the purpose of throwing light upon the decision.

—Baker v. Polydisky, 72.

Injunction pendente lite.

19. On an appeal from an order refusing an injunction pendente lite, the order must be taken as resolving against the appellant all questions of fact which the evidence leaves in doubt.

—Berman v. Minneapolis Photo Engraving Co. 146.

20. Whether an injunction pendente lite shall be issued rests so largely in the discretion of the trial court that this court will not interfere unless an abuse of such discretion be shown.

—Berman v. Minneapolis Photo Engraving Co. 146.

More Definite Pleading.

21. The action of the district court upon an application for an order requiring a pleading to be made more definite and certain is largely discretionary, and will not be reversed, where substantial rights upon the merits are not affected.

—Hart v. Lincoln National Life Insurance Co. 155.

Harmless Error. See Libel and Slander, 2.

22. Defendant's cashier was asked: "What was said about the check?" The answer was: "He told me they would have funds in the course of a couple or three days." The court refused to strike out the answer. Held: It was not prejudicial error to refuse to strike out the answer.

—State Bank of Reading v. Ronan, 236, 238.

23. The court in charging the jury understated plaintiff's claim as to the terms of the contract. Defendant cannot complain of this.

—James E. Carlson, Inc. v. Babler, 125.

Reversal. See Appeal and Error, 20, 21; Broker, 1, 4; Continuance.

24. Where the place of business of a foreign corporation is in this state and there is no showing of assets elsewhere, and the point is raised for the first time on appeal, this court will not reverse the case because of the failure of the trial court to so limit its order.

—Tasler v. Peerless Tire Co. 151.

25. Contradictory evidence as to the respective speeds at which a taxicab and a touring car approached the intersection of two streets where they met in collision. Same number of witnesses of the

APPEAL AND ERROR—Continued.

collision for each party. Verdict for plaintiff approved by trial court. Held: An appellate court has no right to vacate the verdict under such circumstances.

—Holland v. Yellow Cab Co. Inc. 475.

26. Where the injury is to the sacro-iliac joint and affects locomotion and the jury had opportunity to note the physical appearance and movements of plaintiff at the trial, the judgment of the jurors and trial court will not be reversed on appeal, even if plaintiff did engage in dancing a few months after the injury.

—Holland v. Yellow Cab Co. Inc. 476.

27. Even though a vendor, suing the purchaser for breach of an executory contract of sale, was entitled on the record to nominal damages, the case comes within the rule of de minimis, and a reversal will not be ordered for the refusal of court below to award the same to plaintiff.

—Howe v. Gray, 125.

28. The supreme court should hesitate to set aside a verdict on grounds that parties during the trial do not see fit to make part of their case.

—James E. Carlson, Inc. v. Babler, 130.

APPEARANCE.

Voluntary Appearance.

1. A voluntary appearance in an action to foreclose a mechanic's lien is the equivalent of the service of a summons upon the person so appearing. If a party so far appears as to call into action the powers of the court for any purpose except to decide upon its own jurisdiction, it is a full appearance. The acts of the defendants who are here questioning the jurisdiction of the district court over them amounted to a voluntary general appearance.

—Carr-Cullen Co. v. Cooper, 380, 384.

Special Appearance. See Justice of Peace, 4.

2. An attorney's asking only for what the statute authorizes upon dismissal should not be construed into a general appearance or a consent to try a cause not properly in court. Nor should a party be held to have made a general appearance or to have conferred jurisdiction by simply admitting service of a notice of motion in a cause.

—Spicer v. Kennedy, 161.

ARCHITECT.

Action for Compensation. See Work and Labor, 1, 3.

ARMY AND NAVY.

The act of Congress known as the Soldiers' and Sailors' Civil Relief Act, approved March 8, 1918 [U. S. Comp. St. 1918, § 3078½a et seq.], was designed and intended to authorize and require in particular instances the restraint and stay of judicial proceedings commenced in any state or Federal court for the enforcement of pecuniary obligations against those in the military service of the United States; but it has no application to the nonjudicial proceeding for the foreclosure of a real estate mortgage by advertisement, as authorized by our statutes, which was fully completed by a sale of the mortgaged property prior to the commencement of the military service of soldier affected, though the period of redemption had not then expired.

—Taylor v. McGregor State Bank, 249.

ASSAULT AND BATTERY. See Criminal Law, 14, 15.

By Deputy Sheriff Outside of His County in Serving Replevin Papers.
See Principal and Agent, 3.

Punitive Damages.

There was no error in instructing the jury that, in their discretion, they might award punitive damages as against both defendants.

—Daigle v. Summit Mercantile Co. 178.

ASSIGNMENT.

Of Commissions on Renewal Premiums on Policies of Life Insurance.
See Pleading, 4.

Of Wages for Labor upon Timber Products. See Log and Logging, 6.

1. By the enactment of chapter 309, Laws 1905 (G. S. 1913, § 3858), which contains no repealing clause, it was not the legislative intent to repeal or modify the provisions of section 7059, G. S. 1913, as to giving notice of the assignment of wages for labor upon timber products.

—Sheldon v. Padgett, 141.

2. A time check issued by a contractor to a laborer, containing a memorandum of the labor and the amount he is entitled to receive therefor, is evidence of his claim for such labor, and the indorsement in blank of such check and delivery thereof is an assignment in writing of the claim as required by section 7059, G. S. 1913.

—Sheldon v. Padgett, 141.

ATTORNEY AND CLIENT.

Privilege of Attorney on Witness Stand. See Evidence, 7.

Deed from Client to Attorney's Wife.

1. An attorney, obtaining a deed from his client, has the burden of es-

ATTORNEY AND CLIENT—Continued.

establishing the perfect fairness and good faith of the transaction and the adequacy of the consideration. The evidence sustains a finding and conclusion that a deed so obtained, running to the attorney's wife, should be set aside.

—*Delasca v. Grimes*, 67.

2. The court found the grantee paid no consideration for the deed and received delivery with notice through her husband of all the facts surrounding its execution; that the reasonable value of the land was \$7,000 and the total incumbrances did not exceed \$4,500. The findings are well sustained by the evidence. Held: The consideration for the deed was inadequate and the transaction cannot be upheld.

—*Delasca v. Grimes*, 71.

Accounting Between Attorney and Client.

3. Upon setting aside a deed so obtained, there should be an accounting between the parties, in which the plaintiff should be credited with the rents and profits of the land, and charged with taxes, interest, and other proper expenditures made by defendants.

—*Delasca v. Grimes*, 67.

Increase of Attorney's Compensation.

4. A contract of employment between attorney and client is not invalid for the reason that the amount of compensation was increased by agreement subsequent to the bringing of the action.

—*Anker v. Chicago Great Western Railroad Co.* 216.

Lien of Attorney. See Champerty and Maintenance, 1.

5. An attorney has a lien upon a cause of action arising under the Federal Employer's Liability Act (35 St. 65 [U. S. Comp. St. §§ 8657-8665]) for his services, and, upon settlement of the action by the parties without payment of his fees, the attorney may enforce his lien in the action in this state. The deposit of money equal to the amount of such lien in the courts of another state in no manner affects the res upon which such lien is held.

—*Scharmann v. Union Pacific Railway Co.* 290.

6. Defendant brought an action in equity in the state where the accident happened to determine the interest of intervener in the balance due from defendant to plaintiff under the settlement and deposited the amount in the foreign court. Intervener was served personally with summons in Minnesota, but did not answer. Judgment was entered that intervener had no interest in the money deposited in court. Held: The deposit in court in no manner affected the res against which intervener sought to impress a lien; it did not afford the Nebraska court a basis for the service of a sum-

ATTORNEY AND CLIENT—Continued.

mons outside of the state and the decree of the Nebraska court was a nullity insofar as it related to intervener or the cause of action on which he claimed a lien.

—Scharmann v. Union Pacific Railway Co. 292, 293.

Attorney's Fee. In Action to Enforce Lien for Labor upon Timber Products. See Log and Logging, 6.

In Foreclosure of Mechanic's Lien. See Mechanic's Lien, 11.

Attorney Fees Cannot Be Recovered under Workmen's Compensation Act. See Workmen's Compensation Act of Minnesota, 11.

Attorney Fees.

7. Attorney's fees are not allowed in civil actions, can be allowed only when authorized by statute.

—Johanson v. Lundin Bros. 470.

AUTOMOBILE.

Not Per Se a Dangerous Instrument. See Criminal Law, 24.

Parking Car within Prohibited Limit of Village Hydrant. See Municipal Corporation, 6, 7.

Liability When Car Is Stolen from Public Garage. See Garage Keeper, 1-5.

Liability of Head of Family for Injury When Car Is Driven by Member of Family. See Master and Servant, 5.

Husband Liable for Negligence of Wife in Operation of Family Car. See Husband and Wife, 2, 3.

Negligence in Operation.

Of Truck. See Municipal Corporation, 7.

Of Car in Running Over and Killing Injured Person Lying in Street. See Municipal Corporation, 14.

Of Car Causing Pedestrian's Death. See Criminal Law, 19-22.

Of Third Party Employer in Use of His Car. See Workmen's Compensation Act of Minnesota, 3.

Of Car in Striking Pedestrian. See Municipal Corporation, 5.

Of Car in Collision with Pedestrian. See Municipal Corporation, 8, 10, 11.

Of Truck Closely Followed by Motorcycle. See Municipal Corporation, 13.

Charge to Jury Respecting Duty of Driver to Give Warning. See Municipal Corporation, 10.

Contributory Negligence.

Of Passenger Killed at Railway Crossing. See Railway, 2.

Of Guest in Touring Car on Business Streets at Evening Hour, because Not Protesting at Speed of Car. See Municipal Corporation, 16.

AUTOMOBILE—Continued.

Inadvertent Language of Charge in Reference to Contributory Negligence of Passengers in Automobile Approaching Railroad Crossing. See Railway, 3.

Speed of Car.

Section 2635, G. S. 1913, as Amended, Does Not Make Speed of More than Ten Miles an Hour Conclusive of Negligent or Excessive Speed. See Municipal Corporation, 16.

Prohibition of Greater Speed than Reasonable upon Public Highway by Section 2635. See Highway.

Contradictory Evidence as to Respective Speeds of Two Cars with Same Number of Witnesses for Each Party. See Appeal and Error, 25.

BANK AND BANKING.

Effect of Taking Payment of Depositor's Check in Bank Draft or Cashier's Check. See Bills and Notes, 1.

Stopping Payment of Check. See Bills and Notes, 1.

Purchase of Note under Suspicious Circumstances. See Bills and Notes, 5.

Defendant was not entitled to a dismissal when plaintiff rested.

—State Bank of Reading v. Ronan, 236.

BASTARD.

Evidence in corroboration of the mother is not necessary in a case to determine the paternity of an illegitimate child.

—State v. Delke, 453.

BILL OF LADING. See Carrier.**BILLS AND NOTES.**

Conditional Delivery of Premium Note. See Insurance, 16.

Evidence of Delivery on Condition Admissible. See Evidence, 4.

Variance in Description of Note. See Pleading, 8.

Payment of Check.

1. Where a check is presented for payment to the drawee having funds of the drawer to meet it, and the payee, for his own convenience, receives part in cash and part in drafts or cashier's checks of the drawee, the transaction constitutes in law a payment of the check so far as the drawer and drawee are concerned, so that the drawee cannot set up as defense, when sued on the drafts, that the drawer of the check for good cause stopped payment thereon after the drafts were issued and delivered to the payee of the check, nor can the drawer of the check intervene and assert any right in the drafts or claim any relief against the drawee.

—Johnson v. First State Bank of Rollingsstone, 363.

BILLS AND NOTES—Continued.

Action on Check Payable to Order of Defendant and Delivered without Indorsement to Plaintiff. See Contract, 9.

Good Faith of Purchaser.

2. To establish good faith there must not only be an absence of knowledge of any invalidity, but an absence of circumstances which would put an ordinarily prudent man upon inquiry. If there are such circumstances, and he makes no attempt to ascertain the truth, he cannot claim good faith in accepting the instrument.

—First State Bank of Rogers v. Missia, 412.

3. A bank is not a bad-faith purchaser because it is negligent or careless or because it does imprudent or bad banking. Its act must amount to something like fraud upon the rights of the purchaser.

—First National Bank of Rolette v. Andersen, 289.

4. A bank through its cashier purchased of the payee two notes which were given under such circumstances that the makers had a defense against the payee and that a purchaser had the burden of proving good faith and want of notice. The payee was brought to the cashier and recommended by the vice president, who was a member of the discount committee, but not active in bank affairs. The vice president was not a witness nor was there an explanation of his absence; nor was the payee a witness nor was there a showing why he was not. It is held that the question of the good faith of the purchasing bank was for the jury.

—First National Bank of Rolette v. Andersen, 288.

Fraud in Inception—Good Faith of Holder.

5. Horstman, president of plaintiff bank, represented to defendant that he owned land in Florida which he would resell in one year at a profit, if defendant would sign a contract for its purchase. Defendant executed a contract, paid \$200 in cash and signed two notes of \$700 each, in which the blanks for payee's name and rate of interest were left unfilled. It was agreed Horstman should hold the notes without filling in the blanks until title to the land should be vested in defendant. In case the title did not vest in defendant, the cash paid and notes were to be returned to defendant. Horstman never had any right in the land, but two weeks after securing the notes inserted plaintiff's name as payee and 7 and 4 as the rate of interest in the respective notes. He then turned the two notes over to the assistant cashier of plaintiff bank in payment of moneys which, as president of the bank, he had collected from persons indebted to it. The assistant cashier then credited the accounts of the persons who had paid the money, and paid to Horstman the difference in cash. The court found that the

BILLS AND NOTES—Continued.

assistant cashier knew the notes were not received by Horstman on account of any indebtedness due to the bank, and in taking the notes Horstman and the assistant cashier acted in bad faith.
Held:

(1) The title of Horstman was defective, within the meaning of section 5867, G. S. 1913, and cast the burden of proof upon plaintiff that it was an innocent holder in due course.

(2) The evidence sustains the findings to the effect that plaintiff took the notes in bad faith, because of failure to make inquiries called for by the circumstances surrounding the transaction.

—State Bank of Rogers v. Missia, 410.

BOND.

Bonds of Consolidated School District issued before Detachment of Territory from Consolidated District. See School and School District, 4.

Appeal Bond.

No appeal bond need be given by a municipal corporation in appeals to the supreme court.

—Roerig v. Houghton, 236.

Action on Appeal Bond. See Pleading, 5.

BOUNTY.**Soldiers' Bonus Act.**

1. Under section 7 of article 9 of the Constitution there is no limitation of the amount of debt which may be contracted by the state "in time of war, to repel invasion or suppress insurrection." The act of September 22, 1919 (Laws 1919, Ex. Sess. c. 49), appropriating \$20,000,000 for the payment of additional compensation to those serving with the associated forces in the war with Germany, is authorized by said section and is constitutional; and the debt created by the act is a direct obligation of the state.

—Gustafson v. Rhinow, 415.

2. The public debt authorized by that section must not only be for a public purpose, but it must also be for a purpose having some reasonable connection with the conduct, offensive or defensive, of the war in question. It must be for some legitimate military or naval purpose pertaining to the existing state of war.

—Gustafson v. Rhinow, 419.

3. The debt created by the act is for a "public purpose."

—Gustafson v. Rhinow, 415.

BOUNTY—Continued.

4. The act does not include among its beneficiaries residents of Minnesota enlisted in the associated forces, but not enlisted in the forces of the United States.

—Gustafson v. Rhinow, 415, 424.

BROKER.

Insurance Broker. See Insurance, 1—3.

Representing Both Parties.

1. While the negotiations for exchange were pending, plaintiff entered into negotiations with the other party to the exchange, to take over the property which he was to acquire. Plaintiff's evidence is not explicit as to whether defendant was advised of this. No defense predicated on bad faith of plaintiff was pleaded. Plaintiff was not a mere middleman. He negotiated for both sides. A broker negotiating for both sides owes to each the same good faith that he would have owed to either had he acted for him alone. Private negotiations with one party will defeat the broker's right to compensation from the other if the facts are concealed. But where no such defense is pleaded or litigated, the court will not set aside a verdict for the broker on this ground, unless it is clear as a matter of law that the broker was guilty of bad faith. On the evidence in this case, the court cannot so hold.

—James E. Carlson, Inc. v. Babler, 126.

Action against Both Parties for Compensation.

2. A broker may represent both parties to a transaction if the parties have knowledge of the fact and assent thereto, and then he may recover compensation from both parties if they so agree. The evidence is sufficient to sustain a finding that defendant agreed to pay plaintiff, a broker, one-half of a commission for negotiating an exchange of real property.

—James E. Carlson, Inc. v. Babler, 125.

3. The original complaint was on a quantum meruit. There was no error in permitting plaintiff to amend his complaint so as to allege an agreed contract to pay. In fact proof of the agreed contract was admissible under the original complaint.

—James E. Carlson, Inc. v. Babler, 125.

4. On the record before us we are not justified in setting aside the verdict on the alleged ground that plaintiff made misrepresentation to defendant. No such defense was pleaded and the evidence of misrepresentation is unsatisfactory.

—James E. Carlson, Inc. v. Babler, 126.

BUILDING.

Restricted Residence District in Cities of First Class. See Eminent Domain, 57.

It is time that courts recognized the aesthetic as a factor in life. Beauty and fitness enhance values in public and private structures. But it is not sufficient that the building is fit and proper, standing alone, it should also fit in with surrounding structures to some degree.

—State ex rel. v. Houghton, 20.

BURGLARY.

Construction of Insurance Policy. See Insurance, 7.

CANCELATION OF INSTRUMENT.

Action to Cancel Real Estate Mortgage on Ground It Was Given to Secure Debt Incurred by Gambling in Wheat Options. See Gambling, 2.

Action by Person Convicted of Murder of Defendant's Husband. See Convict, 1-3.

A mother conveyed a tract of land to her son in consideration of his verbal promise to support her. The son faithfully performed his promise until his death 23 years later. His widow had no knowledge of the agreement and provided no support for the mother after his death and was never asked to do so. Five years later the mother brought suit to cancel the conveyance for failure to furnish support, but died before it came to trial, and her executor was substituted as plaintiff. Held that in view of the circumstances disclosed by the record a cancellation of the conveyance would be inequitable and will not be decreed; held further that neither the pleadings nor the evidence furnish a basis for any other relief, and that the court correctly dismissed the action.

—Walsh v. Walsh, 182.

CARRIER.

Presentation of Claim—Waiver of Right of Carrier.

The clause in the uniform bill of lading limiting the time within which a claim against the carrier in case of loss of shipment may be made, may be waived by the carrier.

—E. L. Welch Co. v. Chicago, Milwaukee & St. Paul Railway Co., 471.

CASE. See Appeal and Error, 12.

Effect of Failure of Settled Case to Show that It Contains All the Evidence Bearing on Matter Presented for Review. See Appeal and Error, 14.

CASE—Continued.

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—**Bauer v. O'Brien Land Co.** 133.

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 —*State v. Lyons*, 352, 353.
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—Hoel v. Flour City Fuel & Transfer Co. 290.
- DeGraff v. Queen Ins. Co. 38 Minn. 501, 38 N. W. 696.
—Zenith Box & Lumber Co. v. National Union Fire Insurance Co. 390.
- Diamond Iron Works v. City of Minneapolis, 129 Minn. 267, 152 N. W. 647.
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—Delasca v. Grimes, 71.
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- Emery v. Hertig, 60 Minn. 54, 58, 61 N. W. 830.
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CERTIORARI.

No Writ from Supreme Court to Justice of Peace, When. See Justice of Peace, 7.

No Writ When an Appeal Is Given.

Certiorari will not issue to review an order or judgment from which an appeal is given by statute; the remedy by appeal in such case is exclusive.

—State ex rel. v. Kane, 226.

CHAMBER OF COMMERCE. See Exchange, 1, 2.

CHAMPERTY AND MAINTENANCE.

1. After a personal injury case was at issue, plaintiff settled it with defendant, without the knowledge of his attorney or payment of attorney fees. The court granted the attorney's application to intervene for the purpose of determining his right to a lien upon the cause of action and the amount of his fee. The defendant answered the complaint in intervention and alleged the contract of employment between the intervener and plaintiff was champertous and void against public policy, because it was procured by solicitation of a layman employed by the intervener. Held: The evidence was sufficient to sustain a finding of the jury that the action was not procured by intervener by solicitation of a layman for hire.

—Anker v. Chicago Great Western Railroad Co. 216, 217.

CHAMPERTY AND MAINTENANCE—Continued.

2. The evidence examined, and held, to sustain the finding that the intervenor's contract of employment was not champertous and void.
—Scharmann v. Union Pacific Railway Co. 290.

CHANGE OF THEORY.

- Exception to Rule that Such Change Is Not Permitted on Appeal. See Appeal and Error, 4.

CHARITABLE CORPORATION. See Hospital, 1.

Attempted Bequest in Trust Invalid. See Will, 10.

1. Defendant is of the class commonly known as charitable corporations. Its hospital was founded and its buildings erected partly by money donated, and partly by money borrowed. It is not maintained for profit, but most of its patients are pay patients, and the receipts for these patients largely exceed the cost of maintenance. Defendant is liable in damages for decedent's death.
—Mulliner v. Evangelischer Diakonniessenverein of the Minnesota District, 393.
2. The court's reasons for holding a charitable corporation liable are:
 - (1) The doctrine that a person or corporation shall respond for damages caused by the negligence of one of its employees in the course of his employment, is the rule. It is founded on the doctrine that what one does through another, he does himself. If exception is to be made, there must appear ground for the exception.
 - (2) No reason is known why the assumption of risk should be imposed on the patient. Men are not exempt from the consequence of negligence, though on a mission of mercy.
 - (3) Such corporations are not exempt from the consequences of negligence in selecting employees nor exempt from liability to third persons for breach of contract or tort.
 - (4) The court does not believe that a policy of irresponsibility best subserves the beneficent purposes for which a charitable corporation is maintained. It does not approve a public policy which would require the widow and children of deceased, rather than the corporation, to suffer the loss incurred through the fault of its employees; in other words, compel the persons damaged to contribute the amount of their loss to the purposes of even the most worthy corporation.

—Mulliner v. Evangelischer Diakonniessenverein of the Minnesota District, 396, 397, 398.

CIRCUMSTANTIAL EVIDENCE. See Criminal Law, 8.

CITY OF MINNEAPOLIS. See Eminent Domain, 1-7; Municipal Corporation, 24; Street Railway, 1-5; Workmen's Compensation Act of Minnesota, 9.

CITY OF ST. PAUL. See Mandamus, 3.

Removal of School Teacher. See School and School District, 6-9.

Removal of Police under Home Rule Charter. See Municipal Corporation, 3.

CITY OF THIEF RIVER FALLS. See Appeal and Error, 2.

COLLATERAL SECURITY. See Fraud, 4; Pleading, 4.

CONSIDERATION. See Attorney and Client, 1, 2; Contract, 2.

For Issue of Capital Stock in Defendant Corporation. See Corporation, 1.

CONSPIRACY. See Criminal Law, 2; Election, 1.

CONSTITUTION. See Judgment, 4.

Title of Act. See Statute, 2.

No Forfeiture of Estate for Conviction of Crime. See Convict, 1.

Section 1286, R. L. 1905, Not an Infringement of Rights Secured by Constitution. See School and School District, 1.

Construction.

1. The Constitution is as it was when adopted, but, when it employs terms which change in definition as conditions change, it refers to them in the sense in which they are meant when the protection of the Constitution is sought.

—State ex rel. v. Houghton, 16.

What Public Debt Authorized by Article 9, § 7, of the State Constitution. See Bounty, 2.

Public Debt for Military Purpose.

2. Under section 7 of article 9 of the state Constitution, a public debt for a proper military purpose may be legally contracted in time of war, without reference to a state of invasion or insurrection.

—Gustafson v. Rhinow, 418.

Statute Contingent on an Act of Congress.

3. Chapter 455, Laws 1919, is not unconstitutional as a delegation of legislative power to Congress. If an act of the legislature is complete in itself, the legislature may provide that its operation shall be contingent on the existence of an act of Congress of a certain purport.

—State v. Brothers, 337.

CONTEMPT.

Criminal Contempt.

1. Acts not consisting of a failure to do something ordered by the court or to be done for the benefit of a party to an action, but di-

CONTEMPT—Continued.

rected against the dignity and authority of the court, constitute a criminal contempt, under the Minnesota decisions.

—State ex rel. v. District Court of Blue Earth County, 329.

Constructive Criminal Contempt.

2. A proceeding instituted to punish the defendant in a criminal case for contempt of court, committed by him in attempting to induce the complaining witness against him to leave the state and not appear before the grand jury, is one involving a constructive criminal contempt.

—State ex rel. v. District Court of Blue Earth County, 326.

3. The rules of evidence applied in criminal cases should be observed at the hearing in a proceeding in which a person is accused of a criminal contempt, and he cannot be called as a witness for cross-examination under either section 8362 or 8377, G. S. 1913, and compelled to testify against himself.

—State ex rel. v. District Court of Blue Earth County, 326.

4. The immunity conferred upon defendants in criminal cases by section 7, art. 1, of the state Constitution, and by the Fifth Amendment to the Constitution of the United States, extends to prosecutions for criminal contempts.

—State ex rel. v. District Court of Blue Earth County, 327.

5. The provisions of sections 8362, 8377, G. S. 1913, directing the court to call the person accused of criminal contempt for examination, and permitting the adverse party to examine him, do not permit a violation of the guaranties of the Federal and state Constitutions that no person, in a criminal case, shall be compelled to be a witness against himself.

—State ex rel. v. District Court of Blue Earth County, 329, 330.

CONTINUANCE.

A trial court has considerable latitude in passing on an application for a continuance. Its action will not be reversed on appeal except for an abuse of discretion. Upon the showing made in this case, there was no abuse of discretion in denying an application for a continuance.

—Sundin v. County Fire Insurance Co. of Philadelphia, 100.

CONTRACT.

By Managing Partner Binding on Other Partners Unless Outside Scope of Partnership Business. See Partnership.

Concerning Return of Premium Note. See Insurance, 16, 17.

Existence of Contract Doubtful. See Specific Performance, 4.

CONTRACT—Continued.**Acceptance of Offer.**

1. Defendants sent plaintiff a written order for several kinds of lumber. Plaintiff accepted the entire order, but did so in five separate letters on blank forms prepared for that purpose, each of which accepted a specified part of the order. At the trial defendants took the position that accepting the order in this manner created five separate contracts. The trial court held that the order and the several letters accepting it constituted only one contract. The correctness of this rule was not questioned on appeal.

—North Coast Lumber Co. v. Great Northern Lumber Co. 308.

Of Employment. See Master and Servant, 1.**Consideration.**

2. The mortgagee began foreclosure of a mortgage upon a homestead which plaintiff continued to occupy after her husband's death. Plaintiff claimed that it was agreed between her and defendant, her neighbor, that the latter should bid in the land at the sale, and, if he obtained title by foreclosure, pay her \$500. The action was for money had and received; answer, a general denial. Defendant was allowed to amend the answer to conform to the proof. The court told the jury the question in issue was whether defendant agreed to pay plaintiff \$500. Verdict for plaintiff. Appeal from judgment entered notwithstanding the verdict. Held: The evidence was sufficient to sustain the verdict, plaintiff's relinquishment of the right of redemption in reliance on defendant's promise was a legal consideration for the contract, and the jury could find she agreed to relinquish that right, even though express words to that effect were not used.

—Wampa v. Lyshik, 274, 275.

Building Contract.

For Erecting Six Houses on Eight Lots Held One Contract. See Mechanic's Lien, 4(1).

Construction of Building Contract.

3. Conflicting evidence whether contract required plaintiff to do certain tile work on a roof. Verdict for defendant. Held: The verdict must be sustained, because it is not clearly against the evidence and has been affirmed by the trial court.

—Northwestern Marble & Tile Co. v. Swenson, 466.

For Future Support. See Cancellation of Instrument; Convict, 1, 2.

4. The supreme court, in common with other courts, treats contracts for support as of a class by themselves. The particular words used are not very important if the purpose of the parties is clear, and

CONTRACT—Continued.

the courts are quick to give effect to the intent of the agreement.

—Hall v. Crook, 85.

5. Owing to the peculiar character of such transactions, and the fact that usually they are between the aged and their near relatives, and result from the confidence which one reposes in the other, conveyances of property in consideration of an agreement for future support are placed in a class by themselves, and the courts, when called upon to enforce rights growing out of such contracts, endeavor to give effect to the intention of the parties as far as possible, and to protect both by affording each such relief as in equity and good conscience he is entitled to under the facts of the particular case.

—Walsh v. Walsh, 185, 186.

Divisible. See *Exchange of Property*, 3.

Rescission for Fraud. See *Exchange of Property*, 4.

Rescission for Fraud before Performance.

6. Where, at the time of the discovery of the fraud or the facts disclosing it, the contract is yet wholly executory, the defrauded party, under Minnesota decisions, has but one remedy, namely, prompt rescission and disaffirmance. He cannot in such case elect to affirm or stand by the contract and recover damages for the fraud, for by continuing the contract, knowing the fraud, his injury would be self-inflicted.

—Defiel v. Rosenberg, 169.

Rescission for Fraud after Part Performance.

7. A person who has been induced to enter into an executory contract by fraud, upon a discovery of the fraud, the contract then being only partly performed, may disaffirm and rescind as to future performance, retaining the right to be restored to his former position by way of damages or other appropriate relief.

—Defiel v. Rosenberg, 166.

Rescission for Fraud after Full Performance.

8. Where the contract has been fully performed by both parties, upon discovery of the fraud the defrauded party may elect to rescind the contract and demand to be placed in statu quo, or he may affirm, the contract in such case being only voidable, and recover the damage caused by the fraud.

—Defiel v. Rosenberg, 168, 169.

Substantial Performance. See *Mechanic's Lien*, 8.

Performance or Breach.

9. A check payable to the order of defendant was delivered without endorsement to plaintiff under an agreement that it should belong to

CONTRACT—Continued.

plaintiff for the expense of examining a mine, if the statements of defendant in a report made by him respecting a mine were not substantially corroborated by H. and M. Held: In an action to recover the amount of the check, the burden of proving that the report had not been substantially corroborated by H. and M. rested upon the plaintiff, and he failed to sustain it.

—Bryan v. Gordon, 434.

Specific Performance.

Not Prevented by Misunderstanding of Legal Effect of Contract. See Specific Performance, 1.

Evidence. See Contract, 2, 3.

CONVICT.

1. The plaintiff in March, 1910, conveyed to the defendant, his niece, certain premises, in consideration of her giving him care, support and a home during life and burial after death. The obligation to give care, support and a home was made an express lien on the premises but not so the obligation to give burial. After the partial execution of the agreement, and about October 1, 1910, the plaintiff wrongfully killed the defendant's husband. In December, 1910, he was convicted of murder in the second degree and sentenced to life imprisonment. He was pardoned in July, 1916. This action was brought after the pardon to cancel the deed. It is held:

That under the Constitution providing that there shall be no forfeiture of estate for conviction of crime and G. S. 1913, § 8493, providing that one sentenced to life imprisonment shall be deemed civilly dead, the plaintiff did not by his sentence forfeit his property rights.

—Hall v. Crook, 82, 83.

2. The deed contemplated that the plaintiff should have a home with the defendant upon the premises conveyed and that he should there receive from her care and support. By his wrongful act in killing her husband he rendered it impossible for her to perform in the spirit contemplated her agreement to give him a home and care and support; and thereby he forfeited his right to claim performance after pardon.

—Hall v. Crook, 83.

3. The plaintiff's wrongful act did not affect the obligation of the defendant to give proper burial; but such obligation rests upon a personal covenant and is not a charge upon the land.

—Hall v. Crook, 83.

CORPORATION.

Denial of Incorporation. See Pleading, 2.
Issue of Stock.

1. The evidence in support of plaintiff's contention that part of the capital stock in controversy was issued by the company without consideration and that the other part was issued prematurely is not sufficiently clear and certain to justify so holding as a matter of law.

—Berman v. Minneapolis Photo Engraving Co. 146.

Unauthorized Meetings of Directors.

2. The stockholders, having knowingly for a period of more than two years recognized the validity of meetings of the board of directors held without notice to an absent director, who in fact never acted as a director, are precluded from now asserting that such meetings were illegal for failure to give such notice.

—Berman v. Minneapolis Photo Engraving Co. 146.

3. Plaintiffs, having obtained their stock by subsequent purchase from two of the directors who attended the directors' meeting which authorized the issuance of the stock in controversy and voted for the resolution authorizing such issuance, are not in position to assert that such meeting was illegal.

—Berman v. Minneapolis Photo Engraving Co. 146.

Action by Minority Stockholder.

4. Where those in charge of the management of a corporation misapply the corporate assets and divert them to their own private use, a minority stockholder may maintain action to compel restoration, and to restrain such misconduct in the future, and as incident to such relief may, in a proper case, procure the appointment of a receiver.

—Tasler v. Peerless Tire Co. 150.

5. Such an action may be maintained in this state against officers transacting the corporate business in this state, though the corporation is a foreign corporation.

—Tasler v. Peerless Tire Co. 150.

6. Failure of the court to limit, by order, the authority of the receiver to possession and control of assets within this state does not oust the court of jurisdiction.

—Tasler v. Peerless Tire Co. 150.

Foreign Corporation.

Action by Minority Stockholder When Corporate Assets are Misapplied by Managers. See Corporation, 5.

CORROBORATION. See Criminal Law, 6, 7.

COSTS.

Statutory Costs in Action to Enforce Lien for Labor upon Timber Products. See Log and Logging, 6. -

COUNTY AND COUNTY OFFICER.

County May Pay Preliminary Expenses in Drainage Proceeding without Hearing. See Drain, 5.

County Attorney.

Prejudicial Cross-Examination of Defendant in Criminal Proceeding. See Witness, 2.

County Board.

Adding Territory to an Adjoining School District. See School and School District, 5.

Detaching Territory from a Consolidated School District. See School and School District, 2-4.

Sheriff.

Ceases to Act as Officer when He Leaves His County. See Replevin, 2.

COURT.

District Court.

Jurisdiction. See Exchange of Property, 4.

Jurisdiction to Vacate Order Establishing Ditch. See Drain, 4.

Probate Court.

Discharging Executor and Determining Distribution of Property of Estate. See Will, 9(1).

COVENANT.

Breach of Vendor's Covenant to Heat. See Landlord and Tenant, 1, 2.

CRIMINAL LAW. See Infant.

Prejudicial Cross-Examination of Defendant by County Attorney. See Witness, 2.

Warrant of Arrest. See Warrant of Arrest.

Compelling Prisoner to Plead to New Charge.

1. Where a person is in custody for trial on a criminal charge, and a new charge is preferred against him in legal form, of which the court has jurisdiction, the court may require him to plead to such new charge without the formality of the issuance and service of a warrant of arrest.

—State v. Volk, 223.

Conspiracy. See Election, 1.

Conviction for Putting Fraudulent Ballots in Ballot Box at Election. See Election, 1.

CRIMINAL LAW—Continued.

2. It was not error to receive evidence of fraudulent registration on registration days as part of the conspiracy in which defendant participated although defendant was not present at the time of registration.

—State v. Lyons, 349.

Accomplice.

3. The court properly submitted to the jury the question whether Hammett, one of the election clerks, was an accomplice. That Hammett was guilty of the distinct crime of entering fictitious names on the pollbook does not make him an accomplice in the crime of which defendant was convicted. The test as to whether a witness is an accomplice is, could he have been indicted and punished for the offense of which defendant is charged?

—State v. Lyons, 348, 352.

4. Strictly speaking, there is no such thing as an accessory before the fact, for an accessory before the fact is, by our statute, made a principal. G. S. 1913, § 8478.

—State v. Lyons, 353.

5. One connected with the crime as an accessory after the fact is not an accomplice.

—State v. Lyons, 348.

Corroboration of Accomplice on Every Point Unnecessary. See Election, 2.

6. The testimony of Hammett affords sufficient corroboration of the testimony of the accomplices. His testimony that he thought defendant was one of the participants he saw in the election booth was corroborative evidence of identification. It is not necessary that the corroborative evidence should be sufficient, standing alone, to warrant a conviction. It is only necessary that it shall tend in some degree to prove that defendant committed the crime.

—State v. Lyons, 348, 354.

7. It was not error to refuse to instruct the jury that if they found Hammett was an accomplice then there was no sufficient corroboration of the accomplice.

—State v. Lyons, 349.

Circumstantial Evidence.

8. In a criminal prosecution founded on circumstantial evidence, except that the state claims an admission of guilt by an offer of the defendant, after indictment, to return the property alleged to have been stolen, if the trouble were dropped, all of which is in dis-

CRIMINAL LAW—Continued.

pute, the defendant is entitled to a charge on circumstantial evidence.

—State v. Rickmier, 32.

Indictment—Indorsement of Names of Witnesses.

9. Where the grand jury in good faith indorsed on the indictment the names of the witnesses upon whose evidence it is asserted the indictment was found, the indictment will not be set aside because of the claim that other witnesses were examined. It must be conclusively presumed that the indictment was found on the evidence of the witnesses named.

—State v. Rickmier, 32.

10. By neither section 9132 nor section 9180, G. S. 1913, did the legislature intend that an omission to indorse the name of one out of 100 witnesses examined, should be fatal to the indictment, even if the testimony of the omitted witness was immaterial, nor that the court should be required to institute an inquiry to fix the materiality of the evidence of the omitted witness.

—State v. Rickmier, 33, 34.

Indictment Sufficient.

11. An indictment charging that, at a certain time and place, the person named therein did unlawfully practice medicine, and for a fee prescribe, direct, and recommend certain drugs and medicine for use and medicinal treatment (of a certain person) without a license so to do, states an offense under section 4981, G. S. 1913.

—State v. Bohl, 437.

12. It is not necessary, under statute forbidding the practice of medicine without a license, that the indictment negative the exceptions in the statute; such exceptions not appearing in the enacting clause of the act.

—State v. Bohl, 437.

Proof of the Crime Alleged.

13. It is not necessary for the state to prove every allegation in the indictment, if it prove enough to establish a crime alleged.

—State v. Goldstone, 405, 408.

Assault and Battery.

14. The presence of pain, superficial or trivial wounds or temporary impairment of some organ of the body, or the presence of all such results, does not, as a matter of law, bring them within second degree assaults. From the testimony the jury could well come to the conclusion that neither the blow struck by defendant, nor its

CRIMINAL LAW—Continued.

consequences, indicated a greater offense than a third degree assault.

—State v. Gaularpp, 88.

15. The evidence is sufficient to sustain the verdict of assault in the second degree. It was such that it was for the jury to determine whether the offense committed by defendant was of a lesser degree than the one named in the indictment and verdict, but no error can be predicated upon the failure to submit that question to the jury, for the record does not show a request to submit the same, or any objection, made before the jury retired, to the charge on that score.

—State v. Gaularpp, 86.

Keeping Disorderly House.

16. To constitute the offense of keeping a disorderly house it must appear that disorderly acts are habitually permitted on the premises or that the house is kept as a place to which people may and do resort for the purpose of indulging in immoral or unlawful practices.

—State v. Nanick, 413.

17. The finding that defendant was guilty of the offense of keeping a disorderly house is sustained by the evidence.

—State v. Nanick, 413.

18. An uncontradicted statement of defendant to the officer who made the arrest that she "was running the place," is sufficient to sustain a finding that defendant was the keeper.

—State v. Nanick, 414.

Homicide.

19. Defendant, driving an automobile on a public highway, struck a pedestrian. The evidence is sufficient to establish that defendant was guilty of culpable negligence, and that the pedestrian was injured thereby.

—State v. Goldstone, 405.

20. The evidence that the pedestrian was previously in good physical condition, that he was knocked down and run over, was picked up unconscious, and died in a few hours, is sufficient to establish that the contact with the car caused his death. No expert testimony is necessary.

—State v. Goldstone, 405.

21. Section 2635, G. S. 1913, making it a penal offense to drive a motor vehicle at a speed greater than is reasonable and proper having

CRIMINAL LAW—Continued.

regard to the traffic, or so as to endanger life, limb or property, is not void for indefiniteness and it is valid.

—State v. Goldstone, 405.

22. It is the infliction of death by culpable negligence that constitutes manslaughter in the second degree under subdivision 3, section 8612, of our statutes. Disobedience of section 2635 may constitute culpable negligence.

—State v. Goldstone, 405.

23. It was not error to refuse to instruct the jury that negligence, to be punishable criminally, must be foolhardy.

—State v. Goldstone, 406, 409.

24. An automobile is not to be classed with dangerous agencies like dynamite, and cannot be regarded as dangerous per se so as to render its owner liable on that ground alone for injuries resulting from its use, but the use of an automobile is fraught with more danger than the use of some other vehicles, and there is no objection to language in the charge to the jury calling attention to that fact. Judgment affirmed.

—State v. Goldstone, 406.

Larceny.

25. The evidence is sufficient to sustain the verdict that the defendant stole two pigs in excess of the value of \$25, and that therefore the crime was grand larceny in the second degree.

—State v. Rickmier, 32.

CROP. See Landlord and Tenant, 4.

Cropper's Attempt to Satisfy Liability to Creditor without Latter's Knowledge. See Accord and Satisfaction.

Harvesting of Crop Not Construed as Waiver of Fraud Practiced on Plaintiff. See Exchange of Property, 3.

CROSS-EXAMINATION. See Witness, 1-3.**DAMAGES.**

1. The evidence sustains a finding that the tuberculosis from which the plaintiff is suffering was the proximate result of the negligent failure of the telephone company properly to heat the premises in which she worked for the telegraph company.

—Hansman v. Western Union Telegraph Co. 57.

In Action for Assault—Not Excessive.

2. A verdict for \$1,250 in an action for damages for assault is not so excessive as to indicate passion and prejudice on the part of the jury, even though the physical injury to the plaintiff was not seri-

DAMAGES—Continued.

ous, there being credible testimony to the effect that he was the victim of an unprovoked attack on his own premises, in the course of which he was roughly handled, in wanton disregard of his rights.

—*Daigle v. Summit Mercantile Co.* 178.

In Action against Bailee—Not Excessive.

3. Verdict for \$540. Held: The amount of the verdict was justified by the evidence.

—*Steenenson v. Flour City Fuel & Transfer Co.* 375.

In Action on Contract—Not Excessive.

4. Verdict for \$518. Held: The verdict was not so excessive as to require the trial court to set it aside.

—*Stanger v. Pandolfo*, 295.

In Action for Rescission of Contract for Fraud.

Equity Should Follow the Rule of Compensation Applied in Actions at Law for Fraud. See *Exchange of Property*, 5.

Measure of Damages in Action for Rescission of Agreement to Trade Farms, where Defendant Had Conveyed to Innocent Third Parties the Farm Deeded to It before Plaintiff's Discovery of Fraud Practiced on Him. See *Exchange of Property*, 1.

In Actions for Personal Injury—Not Excessive.

5. Verdict for \$3,485. The medical testimony as to the nature and character of the injuries was conflicting, and if the testimony tendered by plaintiff was true, the damages are not beyond fair compensation. The trial judge approved the amount, and interference by the supreme court is not justified.

—*Stapp v. Jerabek*, 439, 441.

6. Verdict for \$6,000. Plaintiff was a Lutheran minister 57 years of age. There was a comminuted fracture of the right leg a few inches above the ankle, and there were other minor injuries. The leg is 1½ inches shorter than the other. There is evidence that a fallen arch has resulted from the injury. Held: The verdict is not excessive.

—*Allen v. Johnson*, 334, 336.

7. Verdict for \$7,000. The evidence as to the character of the injuries was conflicting, presenting a question for the jury, and the verdict was approved by the trial court.

—*Podgorski v. Kerwin*, 319.

8. Verdict for \$18,500. Plaintiff, 27 years of age, was earning \$40 per month. She will always have a fight for life because of tuberculosis, caused by defendant's negligence, and is properly a sana-

DAMAGES—Continued.

torium subject, which means an expenditure of money. Held: The verdict was not excessive.

—*Hansman v. Western Union Telegraph Co.* 57, 59.

In Action for Work and Labor—Not Excessive.

9. Verdict for \$1,000. The claim that the damages awarded are so excessive as to indicate that they were given under the influence of passion or prejudice finds no support in the record.

—*Courtney v. Nagle*, 65.

Punitive Damages. See Assault and Battery.

DEATH. See Criminal Law, 20, 22.

Of Patient in Private Hospital. See Hospital, 2, 3.

Proximate Cause of Death.

Opinion Evidence of Husband of Decedent. See Evidence, 6.

Evidence Sufficient to Show Death by Accident. See Insurance, 14.

Residuary Clause in Will. Effect of Death of Child without Leaving Child. See Will, 9.

DEATH BY WRONGFUL ACT. See Municipal Corporation, 14.**DEED.**

Action to Cancel Deed for Failure to Furnish Support. See Cancellation of Instrument.

Consideration.

Inadequacy of Consideration. See Attorney and Client, 1, 2.

Delivery.

1. The intention of the grantor to pass title by the execution and disposition of his deed is of controlling importance.

—*Kessler v. Von Bank*, 222.

2. Delivery of a deed to an agent, or to a stranger, or for record, even if done without the knowledge of the grantee, if followed by his assent, is a good delivery.

—*Kessler v. Von Bank*, 222, 223.

3. On November 25 the father of plaintiff and husband of defendant Mathilda was on his death bed. At his request a small valise, kept in a closet of the room, was brought out by his wife, the step-mother of plaintiff. Assignments of mortgages kept in the bag were made out to his wife by the clerk of the district court, and executed. Plaintiff was not present when the deeds were executed. Three deeds of separate parcels of land were drawn in favor of plaintiff, and when executed the grantor sank back on his pillow and indicated by motion that the instruments should be placed in the valise and returned to the closet. The grantor died De-

DEED—Continued.

ember 7. On December 14 his widow and plaintiff went to a notary public, who at the request of the widow drew deeds to two small tracts of land from plaintiff to her stepmother as grantee. The deeds were executed and with the three deeds and two assignments of mortgage drawn by the clerk were given to the notary with directions to record all of them. This was done.

Action by the daughter against her stepmother and her stepbrother and stepsisters for partition, which was ordered by partitioning the same by drawing a line north and south through the centre of the quarter section and giving the widow the right to select the tract she desired and awarding her title thereto, and awarding the other half to plaintiff. Defendants appeal. The appeal hinges on whether there was a delivery without an actual passing of the instrument from the hand of the grantor to that of the grantee. The testimony indicated the father and husband wished to dispose of his property while alive and transferred through his daughter what he intended his wife to have of the real estate and that the daughter was to have one-half of the quarter section and the wife all the rest of the property. Held:

(1) The fact that the deeds, after execution and acknowledgment, were placed at the disposal of and left with grantor's wife, evinced an intention of the grantor that they should take effect at once as conveyances. If so, there was a sufficient delivery.

(2) Evidence held to sustain a finding that the deed was duly delivered.

—Kessler v. Von Bank, 220, 221.

Timber Deed with Contingent Reversionary Right in Timber in Grantor. See Log and Logging, 1-3.

Reservation.

4. The language of a reservation in a deed may properly be referred to the land described therein, or to the interest or estate in the land, or to both, according to the intention of the parties.

—International Lumber Co. v. Staude, 357.

5. The words of a deed are to be taken as the grantor's, and any ambiguity is to be resolved in favor of the grantee. A reservation in favor of the grantor is to be construed more strictly than a grant.

—International Lumber Co. v. Staude, 356, 359.

6. The effect of a deed cannot be restricted because rights of property properly embraced in its language were not in the minds of the parties when the sale was agreed upon.

—International Lumber Co. v. Staude, 356.

DEPOSIT IN COURT.

Effect on Attorney's Lien in Minnesota by Deposit of the Amount of the Lien in Court of Foreign State. See Attorney and Client, 5.

DESCRIPTION.

Of Property in Replevin Action Sufficient to Identify Property. See Replevin, 2.

DISMISSAL.

Of Action. See Abatement and Revival; Bank and Banking; Cancellation of Instrument; Malicious Prosecution, 4; Street Railway, 6.

On Appeal from Justice of Peace. See Justice of Peace, 6.

Of Case as Common-Law Action to Proceed to Fix Liability under Workmen's Compensation Act. See Workmen's Compensation Act of Minnesota, 8(3).

Of Railway Company as Defendant upon Bringing in Director General of Railroads. See Railway, 1.

DISORDERLY HOUSE. See Criminal Law, 16-18.**DRAIN.**

Drainage of Meandered Lake.

1. The drainage of a meandered lake is forbidden unless it be of the class authorized to be drained by section 5523, G. S. 1913, as amended by Laws 1915, c. 300 (G. S. Supp. 1917, § 5523).

—State ex rel. v. District Court of Stearns County, 78.

2. Crow Lake, Stearns county, is a meandered lake, having an area of over 500 acres, over half of which is clear, open water, and a shore line of over five miles; the depth of the water is less than four feet on the average, but in places is six or seven feet, fed in part by springs and having no inlet, upon which boats have been kept and used for many years. Wild ducks are hunted in the shooting season. The bottom of the lake is "muck." Held: This lake is not within the class of lakes authorized to be drained by the statute. The case of In re County Ditch No. 34 in Sibley County, 142 Minn. 37, 170 N. W. 883, followed and applied.

—State ex rel. v. District Court of Stearns County, 78.

Judicial Ditch.

Order Establishing Such Ditch Not Appealable, When. See Appeal and Error, 3.

Party to Appeal Estopped.

3. One who, after the order establishing a drainage project has been vacated, takes part in the subsequent proceeding therein to establish

DRAIN—Continued.

the project in a modified form, and appeals from the final order dismissing the proceeding, is concluded thereby from questioning the order vacating the order establishing the ditch.

—County of Itasca v. Ralph, 447.

Order May Be Vacated.

4. The court has the power to vacate an order establishing a ditch upon seasonable application therefor, following Troska v. Brecht, 140 Minn. 233, 167 N. W. 1042.

—County of Itasca v. Ralph, 446.

Payment of Preliminary Expenses.

5. The preliminary expenses in drainage proceedings may be paid by the county, without a hearing, where the county knows them to be just and true.

—County of Itasca v. Ralph, 446.

Farm Crossing.

6. The court properly directed the jury to determine what sort of a farm crossing the average farmer would construct over the ditch, and what sort of fence would be suitable along it, and to allow for such a crossing and for the amount of such fence made necessary by the ditch, in fixing appellant's damages.

—Falkenhagen v. Counties of Yellow Medicine and Lac qui Parle, 257.

Assessment of Benefits and Damages.

7. Where a jury trial is had to determine the benefits and damages which a farm will receive from the ditch, the viewers may testify as to the quantity of wet land on the farm and as to its value with and without the ditch, and such testimony does not infringe the rule that their assessment is not to be used as evidence at such trials.

—Falkenhagen v. Counties of Yellow Medicine and Lac qui Parle, 257.

Action against Contractor.

8. Extra work was done by a subcontractor on a county ditch which cost more than the county was permitted by statute to pay. Subsequently the legislature by Laws 1917, p. 406, c. 269, passed an act which permitted the county to discharge the debt, if it so chose. Thereafter it paid defendant contractor over \$4,000, and plaintiff subcontractor sued defendant to recover \$2,400, the balance due him. Defendant's demurrer to the complaint was sustained by the trial court, on the ground that the judgment in a former action between the parties was res adjudicata. Held: The

DRAIN—Continued.

complaint stated a good cause of action on the theory of money had and received.

—*Seastrand v. D. A. Foley & Co.* 239.

DRUG.

Narcotic Drug.

No Conflict between State Act of 1915 and Harrison Narcotic Drug Act. See Poison.

DRUGGIST.

Prescriptions Signed by Defendant in His Own Handwriting, with the Letters M. D. Appended Thereto, and Filled by Witness, Admissible in Evidence in Prosecution for Illegal Practice of Medicine without License. See Physician and Surgeon.

DYNAMITE. See Criminal Law, 24.

ELECTION.

Conspiracy for Fraudulent Registration of Voters. See Criminal Law, 2.

1. Defendant was indicted with others, for the crime of putting fraudulent ballots into the ballot box at a city election. The state's claim was that, according to a general plan or conspiracy in which defendant participated, the names of fictitious persons were registered, that on the night before election defendant and others marked a number of fictitious ballots and that defendant deposited the ballots in the box on election day. **Held:** The evidence of defendant's participation in the crime was sufficient to sustain his conviction.

—*State v. Lyons*, 348.

2. It was not error to refuse to instruct the jury that if defendant was not actually in the polling booth on election day they must acquit. It was not necessary that the accomplice be corroborated on every point.

—*State v. Lyons*, 348.

ELECTION OF REMEDY. See Contract, 6, 8.

By Defrauded Party between Action for Rescission of Contract and One for Damages. See Exchange of Property, 4.

EMINENT DOMAIN.

Public Use. See Eminent Domain, 5.

1. The Constitution of Minnesota nowhere attempts to define what

EMINENT DOMAIN—Continued.

may be a public use, nor does it prohibit the legislature from determining what shall be deemed such a use.

—State ex rel. v. Houghton, 16.

2. The notion of what is public use changes from time to time. Public use expands with the new needs created by the advance of civilization and the modern tendency of the people to crowd into large cities. The term "public use" is flexible, and cannot be limited to the public use known at the time of the forming of the Constitution. What constitutes a public use at the time it is sought to exercise the power of eminent domain is the test.

—State ex rel. v. Houghton, 16.

3. Whether a use is public is a judicial question. No doubt it needs be when the legislature has not attempted to designate or define the public use for which condemnation is sought.

—State ex rel. v. Houghton, 18.

4. The question as it presents itself to the courts is not whether the use is public, but whether the legislature might reasonably have considered it public. The presumption is that a use is public if the legislature has declared it to be such.

—State ex rel. v. Houghton, 18.

Restricted Residence District in Cities of First Class. See Statute, 2.

5. Laws 1915, c. 128, provides for restricted residence districts in cities of the first class, in which certain classes of buildings shall not be erected. Such restricted district is established by the exercise of the power of eminent domain, and apartment houses, among other classes of buildings, are prohibited therein. The Constitution permits the taking or destruction or damage of private property for public use alone. It is held that the restriction as applied to an apartment house is based upon a "public use," and that the statute providing for condemnation is constitutional.

—State ex rel. v. Houghton, 1.

6. The tendency is in the direction of extending the power of restriction, either through the exercise of the police power or the exercise of the right of eminent domain, in aid of the so-called city planning or the improvement of housing conditions.

—State ex rel. v. Houghton, 17, 18.

7. The right to restrict under the police power without compensation, and to restrict by condemnation with compensation, differ, but have much in common.

—State ex rel. v. Houghton, 17.

EPILEPSY.

As Ground for Annulment of Marriage. See Marriage, 1, 2.

ESTOPPEL. See Insurance, 21.

Wife Not Estopped from Bringing Action on Policy of Insurance Because of Prior Action Thereon by Husband. See Abatement and Revival.

Against Defendant in Action in Replevin Who Answers without Objecting to the Venue and Asks Affirmative Relief. See Venue, 3.

Against Debtor Who Receives and Retains for Months without Question Statement of Account. See Account Stated, 1.

Against Stockholders Who Purchased Stock from Certain Directors Who Were Present at Invalid Meeting of Directors which Authorized Issue. See Corporation, 3.

Against Stockholders Who for Two Years Recognized Directors' Meetings which Were Invalid. See Corporation, 2.

Against Party Appealing from Final Order Dismissing Proceeding to Establish Ditch. See Drain, 3.

1. Plaintiffs, husband and wife, joined in the sale and conveyance of the land involved in the action, which at the time constituted their homestead; the grantee fraudulently caused the deed to be recorded in violation of an agreement not to do so until the purchase price of the property had been paid; he thereby defrauded plaintiffs, for he never paid the instalment of the purchase price agreed upon; the grantee mortgaged the property to defendant Fitzgerald to secure the payment of \$4,000, then loaned to him, and the mortgage was duly recorded; the loan of the money by Fitzgerald was bona fide, in reliance upon the validity of the title of the grantee, and without notice of the rights of plaintiffs. It is held that

(1) On the facts stated plaintiffs are estopped to question the validity of the mortgage.

(2) The inquiry made by defendant of the husband as to the rights of plaintiffs in or to the land, particularly stated in the opinion, was specific and clear, and put him to the disclosure of any claim then existing in their favor.

—Havel v. Costello, 441.

2. The letter of inquiry, written by the attorney of a person proposing to lend money on real estate mortgage, asking whether the person to whom it was addressed (the former record owner) claimed any right or interest in the land described, was sufficient to call from the addressee an assertion of any claim he then had to the land.

ESTOPPEL—Continued.

He not only made none, but he stated he would be entirely off the land before April 1.

—Havel v. Costello, 444, 445.

EVIDENCE.

Circumstantial Evidence, See Criminal Law, 8.

Prima Facie Evidence of Probable Cause. See Malicious Prosecution, 5.

Making Improvement with Consent of Owner. See Mechanic's Lien, 7, 10.

Of Viewers in Ditch Proceeding when Benefits and Damages are Fixed at Jury Trial. See Drain, 7.

Judicial Notice.

1. In a suit for malicious prosecution, the court will take judicial notice of a village ordinance requiring a license for transient merchants. G. S. 1913, § 7773.

—Buhner v. Reusse, 452.

Presumption. See Adverse Possession, 1, 2, 5; Criminal Law, 9.

That Sale Is for Cash. See Sale, 1.

That Use Is Public if Legislature Has Declared It to Be Such. See Eminent Domain, 4.

Burden of Proof. See Bills and Notes, 4, 5(1); Contract, 9; Libel and Slander, 2; Railway, 6.

On Attorney to Prove Perfect Fairness of Transaction with Client. See Attorney and Client, 1.

On Garage Keeper when Automobile Is Stolen from Public Garage. See Garage Keeper, 1, 2.

On Defendant to Show Good Faith in Purchase of Premium Note. See Insurance, 18.

That a Letter, Postage Paid and Properly Addressed, Deposited in the Mail, Reached Its Destination. See Insurance, 12.

Declaration.

2. Where there are several legatees in a will, declarations or admissions by one of them tending to cast doubt on the instrument presented for probate are not admissible, where such legatee has not taken the stand to sustain the will, and such declarations are not part of the res gestae of its execution.

—Benrud v. Anderson, 111.

3. Declarations of intention to do some act in the future are often admissible to characterize the act when done. If such declarations are remote from the performance of the act to which they relate,

EVIDENCE—Continued.

their admission in evidence is of little weight. It is for the trial court to determine when the limit is reached.

—Kessler v. Von Bank, 222.

Documentary.

Minute Book Kept by Secretary of Ladies Aid Society Admissible. See Principal and Agent, 2.

Prescriptions Filled by Druggist Admissible in Prosecution for Illegal Practice of Medicine. See Physician and Surgeon.

Oral Testimony as to Conditional Delivery of Note.

4. There was no error in admitting oral testimony to the effect that the delivery of the promissory note was conditional, nor as to what should be done with the insurance policy if other insurance was effected, since nothing in regard to that matter is contained in the written instruments then delivered.

—Wade v. National Bank of Commerce, 188.

5. The court did not exceed its discretion in ruling that the witnesses who testified as to value were competent to do so.

—Falkenhagen v. Counties of Yellow Medicine and Lac qui Parle, 257.

Opinion Evidence.

6. The opinion of a husband that his wife had been killed by jumping from a buggy drawn by runaway horses which he was driving, based wholly upon her act in jumping from the carriage, was of no greater force than that of any other person and clearly was not conclusive that she thus met her death.

—Bursaw v. Plenge, 460.

Expert Opinion.

7. Application to release from guardianship an old widower with a weakness for young women. His attorney at the time the guardian was appointed was called as a witness by the guardian and was asked whether the man was of sound mind on the question of women. Held: It was proper for the trial court to exclude an answer on the ground that the question called for expert testimony, and the requested opinion must be necessarily based in part upon what the witness had learned in the course of privileged communications.

—Hallenberg v. Hallenberg, 43.

EXCEPTION.

Effect of Failure to Take Exception in Trial Court. See Appeal and Error, 6, 10, 11.

EXCHANGE.

Hedging on Purchases of Grain in Country by Sales for Future Delivery on Board of Trade. See Gambling, 1.

1. Sales made on the Minneapolis Chamber of Commerce are governed by the rules and customs of the chamber.

—Dalrymple v. Randall, Gee & Mitchell Co. 27.

2. Under these rules grain on track sold in carload lots is to be weighed by the state weigher at the time it is unloaded and is to be paid for before two o'clock of the day on which such weights are given out. Plaintiff sold a carload of grain on the floor of the chamber to R. J. Johnstone, who immediately resold it to a third party, who again resold it. It was switched to an elevator, where it was unloaded, weighed and mixed with other grain. Johnstone failed to pay at the prescribed time and on the same day plaintiff notified Johnstone's vendee, who then had the proceeds of the grain, that the grain, not having been paid for, belonged to him. Held, that the finding of the trial court that the sale was for cash, that delivery of the grain was conditional on payment, that the condition had not been waived, and that plaintiff remained owner of the grain and entitled to its proceeds, is sustained by the evidence.

—Dalrymple v. Randall, Gee & Mitchell Co. 27.

EXCHANGE OF PROPERTY. See Fraud, 2, 4.

1. Plaintiff was induced to trade farms with defendant through the latter's misrepresentations, and he sues for rescission. On the trial it appeared that before plaintiff discovered the fraud practiced upon him and before his offer to rescind, defendant had conveyed to innocent third parties the farm deeded to it pursuant to the agreement to trade. It is held that the measure of restitution is the value of the farm which plaintiff parted with at the time the trade was made, and not what defendant afterwards received on a sale thereof.

—Bauer v. O'Brien Land Co. 130.

2. The findings that defendant made false representations as to the farm it traded for plaintiff's are amply sustained as to several material matters alleged in the complaint, and these support the judgment, even though as to others the evidence be insufficient. The finding as to the value of the farm plaintiff parted with has support.

—Bauer v. O'Brien Land Co. 131.

3. The evidence does not conclusively show a waiver of the misrepresentations. The contract for the exchange of the farms had been consummated when plaintiff discovered the fraud so far as the

EXCHANGE OF PROPERTY—Continued.

transfer of the title was concerned, but not as to the part thereof relating to the leasing. When defendant refused to rescind and threw upon plaintiff the duty to harvest and care for the crops, his so doing should not be construed as a waiver of the fraud. Furthermore, the deeding and the leasing may be considered as divisible parts of the contract, so that the one could be rescinded and the other carried out.

—Bauer v. O'Brien Land Co. 131.

4. A defrauded party by offering to rescind does not thereby forego his equitable remedy of rescission. He still has his election to sue in equity for rescission or at law for damages. And if he sues for rescission, the court is not divested of jurisdiction to proceed if it develops that restitution in kind cannot be had because, prior to the offer to rescind, the other party to the transaction had disposed of the property obtained to good faith purchasers without notice of fraud.

—Bauer v. O'Brien Land Co. 131.

5. Where defendant obtains property upon an exchange of lands, and conveys what he received before plaintiff attempts to rescind for misrepresentations, equity should follow the rule of compensation applied in actions at law for fraud inducing an exchange of property, and award the value of the land, with interest since the transaction.

—Bauer v. O'Brien Land Co. 133.

EXECUTOR AND ADMINISTRATOR.

Construction of Will and Distribution of Estate. See Will, 9(1).

Claim against Estate.

1. A pecuniary obligation, imposed upon the estate of a deceased person by a contract made in his lifetime, constitutes a "claim," within the meaning of the statutes for the presentation and allowance of claims against such estates, G. S. 1913, § 7323, even though it could not be enforced against decedent in his lifetime.

—Hayford v. Daugherty. 89.

Reimbursement for Expenses of Litigation.

2. An executor nominated in a will, though acting in good faith, is not entitled to reimbursement out of funds of the estate for his services, expenses and attorney's fees, in an unsuccessful effort to sustain the will upon appeal against a contest by the widow and sole heir on the ground that the will is void under the statute.

—Minnesota Loan & Trust Co. v. Pettit, 244.

EXEMPTION.

Of Public Officer or Agent from Liability for Error of Judgment in Obeying Statute. See Officer, 2.

FARM CROSSING.

Over Ditch. See Drain, 6.

FENCE. See Drain, 6.

Statute Requiring Railway to Fence Right of Way Inapplicable, when Railway Tracks are in Street Dedicated to Public Travel. See Railway, 6.

FIRE.

Origin of Fire Attributed to Negligence of Defendant Railway. See Railway, 9.

FIXTURE.

1. A chattel does not become a fixture unless physically or constructively annexed to the freehold.
—Hanson v. Vose, 264.
2. An article annexed to the freehold but which can be removed without substantial injury to the realty may remain a chattel if the circumstances show that such was the intention.
—Hanson v. Vose, 264.
3. If annexed to the freehold, the manner in which an article is annexed may convert it into realty regardless of other considerations. Usually the manner of annexation is not decisive, but only one of several facts to be considered in determining whether the article has become realty or remains personalty as between the parties concerned.
—Hanson v. Vose, 267.
4. Where the holder of a ground lease erects an apartment building and installs a gas range and a door bed in each flat and thereafter forfeits his lease, these articles will pass as fixtures to the owner of the realty if no rights of third parties are infringed and there be no agreement to the contrary.
—Hanson v. Vose, 264.
5. As against third parties having rights in these ranges and beds, the landowner is in substantially the same position as a prior mortgagee of the land.
—Hanson v. Vose, 265.
6. Where the holder of the ground lease purchased these ranges and beds under a conditional contract of sale by which title and right of removal remained in the vendors and after defaulting in his pay-

FIXTURE—Continued.

ments transferred all his rights in them to a third party, not concerned in the real estate, whom the vendors accepted as the purchaser in his stead, and the ranges and stoves could be removed without injury to the building itself, he never had the right to make them a part of the realty and such third party is entitled to them as against the landowner.

—Hanson v. Vose, 265, 267.

7. The rule requiring a tenant to remove his removable fixtures at or before the end of his term does not apply to a person to whom is transferred the rights of the vendee of chattels under a conditional sale contract.

—Hanson v. Vose, 265, 271.

FRAUD. See Account Stated; Bills and Notes, 3; Exchange of Property, 1-5.

In Selection of Trade-Name. See Trade-Mark and Trade-Name, 4.

Rescission of Contract for Fraud before Performance. See Contract, 6.

Rescission of Contract for Fraud after Part Performance. See Contract, 7.

Rescission of Contract for Fraud after Full Performance. See Contract, 8.

Unintentional Misrepresentation.

1. A false representation, made by a party having no interest in the transaction to which the statement relates, is not sufficient to sustain an action for deceit, if the party does not know that the statements are false, and honestly intends to tell the truth.

—Neelund v. Hansen, 228.

2. Where a person not a lawyer, nor particularly skilled in drafting papers nor in passing on their validity, is paid one dollar by a person who is exchanging his farm for other land, to draw the deeds, he owes the latter no higher duty than to act honestly and in good faith. He must not intentionally mislead, but if he acts and answers honestly to the best of his ability, he does his whole duty. In such case a less degree of care is required than where one makes a statement for a consideration as part of a contract.

—Neelund v. Hansen, 230.

3. An instruction to the jury, that there must have been an intention on the part of the defendant to deceive, or there can be no recovery, was not error under the facts in this case.

—Neelund v. Hansen, 228.

FRAUD—Continued.**Evidence Insufficient.**

4. Defendant bank held as collateral security a contract for a deed to real property, part of which was the vendee's homestead. The vendee agreed with plaintiff to exchange the property for a farm, and together they went to defendant bank to close the deal, asked defendant Hansen, president of the bank, who was not a lawyer, to draw the papers and each of them paid him one dollar for his services. The plaintiff, his wife joining, duly executed a deed to the farm which ran to the bank, and the deed was left there as collateral in lieu of the contract for a deed. The vendee in that contract executed a contract by which he was to convey to plaintiff title to the homestead, the deed to be delivered upon certain payments being made as specified in the contract. The vendee executed this contract, but his wife being insane did not join therein, and there being default in the payments, plaintiff failed to obtain title to the property. He then brought an action to set aside his deed to the farm and won the case. In this action against Hansen and the bank, the complaint alleged that Hansen, for the purpose of inducing him to deliver the deed to the farm, falsely stated that the second contract, when signed by the vendee in the first contract, would be valid and sufficient to convey a good and absolute title of the property to plaintiff and plaintiff could rely thereon; that plaintiff believed the statement made by defendant Hansen and was thereby deceived to his damage. The court charged the jury that there must have been an intention on the part of Hansen to deceive or there could be no recovery. Verdict in favor of defendant. Held: The evidence was sufficient to justify the verdict.

—Neelund v. Hansen, 228.

GAMBLING.**"Hedging" on Purchases of Grain.**

1. Under the practice of "hedging" in the purchase of grain, in theory at least, when a buyer purchases grain in the country he also sells on the Chamber of Commerce of Minneapolis for future delivery a sufficient quantity to cover such purchase, so that whether the price goes up or down his gain on one transaction will offset his loss on the other. As sales for future delivery in the terminal markets are made for delivery on the last day of May, July, September or December, a country buyer, who is "hedging," usually sells his grain when it arrives at the terminal market and then closes his previous sale for future delivery by buying back an equal quantity.
144 M.—34.

GAMBLING—Continued.

tity on the board of trade. One board-of-trade transaction thus cancels the other and the gain or loss balances approximately the loss or gain on the actual grain bought, shipped and sold, leaving the dealer his regular profit.

—*Bolfing v. Schoener*, 429.

2. Action to cancel a real estate mortgage on the ground it was given to secure a debt incurred by gambling in wheat options. Bolfing bought grain and operated a small elevator in a village in Stearns county. Appellant is a grain commission merchant buying and selling grain on the Minneapolis Chamber of Commerce, of which it is a member. In April, 1917, Bolfing and his wife executed the mortgage on their homestead to secure the balance of defendant's account against him. He died in July, 1917, and the action was brought by his wife. The evidence fully justified the finding that no purchase or sale of actual grain was intended in any of the option deals by either Bolfing or defendant. The court found all such transactions were wagers on the rise or fall of the market, were contrary to law and void, and ordered the mortgage canceled. The court did not err.

—*Bolfing v. Schoener*, 426, 427.

GARAGE KEEPER.

1. Where an automobile is stolen from a public garage in which it had been stored for pay, the burden is on the garage keeper to show that he was free from negligence.

—*Hoel v. Flour City Fuel & Transfer Co.* 280.

—*Steenenson v. Flour City Fuel & Transfer Co.* 375.

2. This is not merely the burden of going forward with proofs, or a shifting burden, but the burden of proving to the jury that the loss did not come from his negligence.

—*Hoel v. Flour City Fuel & Transfer Co.* 280.

3. It appearing that defendant had a large number of automobiles in storage and had no one at the garage during the night, that the thieves entered through a window which may have been left open by defendant's employees, and that the doors through which automobiles passed could be opened from the inside of the building at any time by simply unhooking an iron hasp from a staple in the wall, the court cannot say as a matter of law that defendant was free from negligence, and the finding of the jury must stand.

—*Steenenson v. Flour City Fuel & Transfer Co.* 375.

GARAGE KEEPER—Continued.

4. The charge of the court was sufficiently favorable to the defendant; and the evidence was not such as to require a finding that there was not negligence of the defendant causing the loss.
—Hoel v. Flour City Fuel & Transfer Co. 280.
5. The court did not err in refusing to receive evidence of notices posted about the garage, not shown to have come to the attention of the plaintiff, disclaiming liability in case of loss by theft.
—Hoel v. Flour City Fuel & Transfer Co. 280.

GARNISHMENT.

Appeal from Default Judgment. See Justice of Peace, 1.

GRAND JURY. See Contempt, 2.

HABEAS CORPUS. See Poison.

HEALTH.

Action for Damages for Illness from Inhaling Disease Germs. See Master and Servant, 4.

HIGHWAY.

Speed Law, Section 2635, G. S. 1913, Valid. See Criminal Law, 21.
The real prohibition under section 2635 is the driving of a motor vehicle upon a public highway at a speed greater than is reasonable or proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb or injure the property of any person.
—State v. Goldstone, 408.

HOMESTEAD.

Action to Cancel Mortgage Given to Secure Debt Incurred by Gambling in Wheat Options. See Gambling, 2.
Estoppel against Husband and Wife from Questioning Validity of Mortgage Made by Their Fraudulent Grantee. See Estoppel, 1.
Foreclosure of Mortgage Thereon. See Contract, 2.
Deed to Homestead Not Signed by Insane Wife of Vendor. See Fraud, 4.
Under G. S. 1913, § 6857, which exempts the homestead of a debtor and his family from seizure and sale under legal process on account of any debt not lawfully charged thereon in writing, held: A statement in a confession of judgment upon a promissory note, given for borrowed money, waiving defendant's right and benefit of the law exempting property from sale on execution, binds no specific property, creates a lien upon nothing, is not a charge in

HOMESTEAD—Continued.

writing upon the homestead and does not subject it to levy under execution issued upon such confessed judgment.

—Benning v. Hessler, 403, 404, 405.

HOMICIDE. See Criminal Law, 19-24.**HOSPITAL.**

Charitable Corporation Liable in Damages for Death of Patient. See Charitable Corporation, 1.

1. When a patient enters a private hospital, maintained for the profit of the owners, knowing that the number of nurses is less than the number of patients, he may not expect constant attendance, but the patient is entitled to such reasonable attention as his safety may require. If the patient is temporarily bereft of reason, and is known by the hospital authorities to be in danger of self-destruction, the authorities are in duty bound to use reasonable care to prevent such an act.

—Mulliner v. Evangelischer Diakonniessenverein of the Minnesota District, 394.

2. A pneumonia patient in defendant's hospital, suffering from delirium, was left alone in a second story room. A few minutes later the window was found open and the patient was lying dead on the ground below. This was sufficient evidence to sustain a finding that he was killed by the fall.

—Mulliner v. Evangelischer Diakonniessenverein of the Minnesota District, 392.

3. There is sufficient evidence that his death was due to the negligence of defendant and its employees.

—Mulliner v. Evangelischer Diakonniessenverein of the Minnesota District, 392.

HUSBAND AND WIFE.

Insurance Policy on Wife's Property Written in Name of Husband. See Insurance, 4.

Mortgage.

Husband Liable for Torts of Wife Acting as His Agent.

1. Section 7146, G. S. 1913, declaring the husband not liable for the torts of his wife, abolished the rule of the common law in such cases, but was not intended to include torts committed by the wife while acting as his agent or representative, under authority expressly or impliedly conferred upon her.

—Plasch v. Fass, 44.

HUSBAND AND WIFE—Continued.

2. The husband is liable for the negligence of his wife in the operation of an automobile furnished by him for the comfort and pleasure of the family, and which he permits her to use for that purpose.

—Plasch v. Fass, 44.

3. When the question of the liability of a husband for the negligence of his wife in the operation of a motor car is squarely presented to them, it is obvious the courts will apply the rule held by each as to the liability of a father for the negligence of a son or daughter.

—Plasch v. Fass, 47.

Opinion of Husband as to Cause of Wife's Death. See Evidence, 6.

INDICTMENT.

Indorsement of Names of Witnesses. See Criminal Law, 9, 10.

For Practice of Medicine without License. See Criminal Law, 11.

Exceptions in Penal Statute Need Not Be Negatived in Indictment when They Do Not Appear in Enacting Clause. See Criminal Law, 12.

INFANT.

The evidence, though not entirely free of doubt, is held sufficient to sustain the verdict of guilty.

—State v. Taylor, 377.

INJUNCTION. See Municipal Corporation, 22, 23.

Pendente Lite. See Appeal and Error, 20.

On Appeal from Order Denying Such Injunction, Questions of Fact Left in Doubt by Evidence are Taken as against the Appellant. See Appeal and Error, 19.

Against Special Election for Adoption of Street-Railway Franchise. See Municipal Corporation, 24.

Against Use of Trade-Name. See Trade-Mark and Trade-Name, 5.

INSANITY.

Incompetent. See Evidence, 7.

1. No person in good health and of sound mental powers should be placed under guardianship without clear proof that, because of the matters enumerated in G. S. 1913, § 7433, he "so spends or wastes his estate as to be likely to expose himself or his family to want or suffering."

—Hallenberg v. Hallenberg, 42.

2. A widower of 80 to whom young and pretty women strongly appealed, after an unfortunate marriage to a young woman, secured a di-

INSANITY—Continued.

voice from her and was about to marry another, when his sons petitioned the probate court to have a guardian appointed for him. After two months under guardianship, he petitioned the court to be adjudged competent. It was virtually conceded that he was as competent to manage his large property as he had ever been. Held: The evidence sustains the findings and conclusions that respondent was of sound mind and entirely capable of caring for his person and property.

—Hallenberg v. Hallenberg, 39.

INSURANCE.

1. Sections 3297, 3322 and 3607, G. S. 1913, do not purport to define the scope of the agency of an insurance broker.

—Zenith Box & Lumber Co. v. National Union Fire Insurance Co. 391, 392.

2. In Fredman v. Consolidated F. & M. Ins. Co. 104 Minn. 76, 116 N. W. 221, it was held that a broker has no implied authority to bind the insurer by agreement not embodied in the policy written. It is just as clear that a broker has no implied authority to bind the insured by agreements not embodied in the policy delivered to him. Clearly there is no statute which makes the broker the general agent of the insured.

—Zenith Box & Lumber Co. v. National Union Fire Insurance Co. 391, 392.

3. An insurance agent, who, without the knowledge of the insured, procures another agent to write the risk, dividing commissions with him, is not authorized, as an agent of the insured, to make terms, or to bind the insured by stipulations not embodied in the policies and not known to him, and the insurer is not entitled to have the policies reformed to conform to terms agreed upon between the insurance agents.

—Zenith Box & Lumber Co. v. National Union Fire Insurance Co. 386.

Reformation of Policy.

4. In the course of negotiations between plaintiff's husband and the agent of a fire insurance company for a policy covering property owned by plaintiff, the agent was informed that the property belonged to plaintiff and that the title was in her name. The court found that it was mutually intended by the husband and the agent of the insurance company that the wife should be named in the policy as the person assured, and that, through oversight and inadvertence on the part of the company, the husband's name was

INSURANCE—Continued.

written in the policy instead of the wife's, without knowledge of the mistake on the part of either the husband or the wife. **Held**, that the trial court was right in holding that there should be a reformation of the policy by substituting in the policy the name of the wife for that of her husband as the person insured thereby.

—*Sundin v. County Fire Insurance Co. of Philadelphia*, 100.

5. In construing a policy of insurance, prepared by the insurer, all reasonable doubt must be resolved in favor of the insured.

—*Zenith Box & Lumber Co. v. National Union Fire Insurance Co.* 390.

False Statements in Application. See *Insurance*, 13.

Notice of Loss. See *Insurance*, 15.

6. Notice of loss, in the form of a verified statement made in duplicate, one copy being properly mailed to the company at its office in New York, and the other to its authorized agent in St. Paul, so that the agent might receive the same in the ordinary course of mail within the time limited for giving such notice, is sufficient.

—*Powers v. Fidelity & Casualty Co. of New York*, 283.

Burglar Insurance.

7. The defendant issued to the plaintiff a policy of burglar insurance by which it promised indemnity against loss by felonious entry into his safe by actual force of which there were visible marks upon the safe by tools or explosives, etc. Liability was excluded if entry was effected by opening the door by a key or the manipulation of the lock. The plaintiff sustained a loss. The entry of the outer door was effected by the manipulation of the lock. The entrance through the inner door was effected by the use of a hammer and chisel, and there were visible marks of the forcible entry. It is held that the defendant is liable on the policy.

—*Moskovitz v. Travelers Indemnity Co.* 98.

Fire Insurance.

Owner Not Estopped from Maintaining Action Because of Prior Action on Policy Brought by Husband. See *Abatement and Revival*.

8. Certain policies of insurance on forest products at eight locations "on Saari Brothers Railroad" are held to be blanket policies, not prorated among the specific locations, but covering each to the full amount.

—*Zenith Box & Lumber Co. v. National Union Fire Insurance Co.* 386.

9. Such policies are also held to cover products adjacent to locations specified, not piled or banked, but ready for loading, and left for

INSURANCE—Continued.

the purpose of being loaded without being banked. Such products were "situated" at such locations within the meaning of the policies.

—Zenith Box & Lumber Co. v. National Union Fire Insurance Co. 386.

10. Each policy had indorsed thereon, in typewriting: "Floater form." The word floater is commonly used synonymously with blanket. "Blanket" policy, that is, insurance not prorated among the specific divisions, but covering each division to the full amount.

—Zenith Box & Lumber Co. v. National Union Fire Insurance Co. 388, 389.

11. The evidence shows that one of the buildings insured was occupied as a dwelling house and the other as a barn when destroyed by fire.

—Sundin v. County Fire Insurance Co. of Philadelphia, 101.

Health and Accident.

12. It was claimed the minor decedent met with an accident May 12. He continued to work until June 23, when he was taken seriously ill, as the result of the injury, and died July 2. His mother, plaintiff, claimed she had no knowledge of the policy until June 27, and that on July 10, as soon as she had returned from the funeral and sufficiently recovered, she wrote a letter to defendant. It is admitted this letter was received, but it is claimed it was insufficient because it failed to state that death was the result of an accident. On July 11 plaintiff's attorney drew up a notice of death by accident, a carbon copy of which was put in evidence, and plaintiff mailed the original in the post office at Melrose, addressed to defendant's district agent at St. Paul, and paid the postage thereon. Defendant claims the original was not received. **Held:** Applying the presumption that where a letter is deposited in the mail, postage paid and properly addressed, there is a strong presumption that it reached its destination, the jury were justified in finding that the letter was mailed and that the notice was received.

—Powers v. Fidelity & Casualty Co. of New York, 282, 285.

13. In an action to recover on a health and accident policy, whether the insured made statements in his application which were false was, under the evidence, a question for the jury.

—Powers v. Fidelity & Casualty Co. of New York, 282.

14. The evidence considered, and held sufficient to sustain a finding that the death of the insured was the result of an accident.

—Powers v. Fidelity & Casualty Co. of New York, 283.

INSURANCE—Continued.

15. Under an insurance policy, which provides that written notice of injury must be given within 20 days after the date of the accident, but failure to give such notice within that time shall not invalidate the claim, if it was given as soon as reasonably possible, the mailing of a letter properly addressed to the general agent of the company, with postage paid, was sufficient to make a question of notice for the jury.

—Powers v. Fidelity & Casualty Co. of New York, 282.

Life Insurance.

16. The delivery at the same time of an insurance policy, a promissory note for the premium therefor, and a written contract concerning a return of the "premium" held to constitute one transaction. And when so considered, in the light of surrounding circumstances, the contract should be construed as an agreement that the payee in the note was to return it to the maker, if, at any time within 60 days, the maker obtained more satisfactory insurance than contained in the policy mentioned, thus making the delivery conditional.

—Wade v. National Bank of Commerce, 188.

17. The written contract referred to did not permit a transfer of the note before the expiration of the 60 days therein specified.

—Wade v. National Bank of Commerce, 188.

18. The fact being proven beyond dispute that under the agreement plaintiff was entitled to the possession of the note, the sole issue left was whether defendant purchased the same without notice of the agreement, and the court correctly charged that the burden was upon defendant to show itself a bona fide holder in due course, without notice.

—Wade v. National Bank of Commerce, 188.

19. The evidence is sufficient to warrant the jury in finding that defendant was not a bona fide holder of the note, in due course, without notice.

—Wade v. National Bank of Commerce, 188.

20. Plaintiff testified defendant's cashier called him by long distance telephone, and, after introducing himself, asked if plaintiff had given Buckpitt (the payee) a note for \$1,425.60, and what it was for. Plaintiff replied that he had made the note for life insurance, but it was not to be cashed for 60 days. Then the cashier said: "Mr. Buckpitt wants to talk to you." Held: The jury could readily find from this that when the cashier learned there was some agreement which interfered with a transfer of the note, he purposely refrained from learning more. The court is of opinion

INSURANCE—Continued.

that the jury could find that such circumstances came to the cashier's notice touching the agreement and conditional delivery of the note, that his failure to pursue further inquiry before buying amounted to bad faith.

—Wade v. National Bank of Commerce, 193, 194.

21. The evidence does not show plaintiff estopped from claiming a return of the note.

—Wade v. National Bank of Commerce, 189.

INTENT.

To Deceive. See Fraud, 3.

Where Will Fails to Carry out Intention of Testator. See Will, 1, 6.

Of Grantor in Deed to Pass Title by Its Execution. See Deed, 1, 3(1).

Declaration of Intention to Do Some Act in the Future Admissible, When. See Evidence, 3.

Of Parties to Contract for Future Support Given Effect by the Courts. See Contract, 5.

INTEREST.

In Vendor's Action for Breach of Executory Contract for Sale of Land, Claim for Interest on Purchase Price Should Be Specially Plead. See Vendor and Purchaser, 3.

Effect of Falling to Question in Trial Court Amount of Interest Included in Verdict. See Appeal and Error, 8.

INTERVENTION. See Attorney and Client, 6.

By Attorney for Purpose of Fixing Right to Lien upon Cause of Action and Amount of His Fee. See Champerty and Maintenance, 1.

By Drawer of Check in Action by Payee against the Bank. See Bills and Notes, 1.

INTOXICATING LIQUOR.

Object of Prohibition.

1. The ultimate purpose of prohibition is to prevent the excessive use of intoxicating liquors. To accomplish that purpose, and to prevent evasions, the legislature may prohibit the traffic, the sale, the transportation, the possession, and the manufacture, even for the use of the manufacturer.

—State v. Hosmer, 343, 345.

2. In order to make the enforcement of prohibition effective, the legislature may prohibit traffic in beverages near to intoxicants, though not actually intoxicating. The fact that the legislature declares such beverages intoxicating does not invalidate such prohibition.

INTOXICATING LIQUOR—Continued.

It is within the power of the legislature to prohibit the manufacture, transportation, and sale of liquor containing one-half per cent. of alcohol.

—State v. Brothers, 338, 342.

State Prohibition Act.

3. A state statute, absolutely prohibiting, within the limits of the state, the manufacture and sale of intoxicating liquors, is a warranted exercise of the police power of the state. It is not in contravention of our state Constitution or of the Constitution of the United States.

—State v. Hosmer, 343.

—State v. Brothers, 341.

4. What the Constitution requires is that a statute shall embrace but one general subject, and that all matters contained in it shall be so related to each other as to be fairly germane to that subject. The State Prohibition Act (Laws 1919, p. 537, c. 455), does not violate this requirement. The prohibition of the manufacture and sale of liquor, the regulation of such manufacture and sale, and the definition of a nuisance and its abatement, constitute but one general subject, the prohibition of the traffic in intoxicating liquor for beverage purposes. The provisions as to nuisances have relation to its enforcement and pertain to the general subject of the act.

—State v. Brothers, 340.

5. The provision that the statute is intended to provide for the enforcement of the War Prohibition Act of Congress does not constitute a separate subject.

—State v. Brothers, 337, 340.

6. The statute is not in conflict with the act of Congress. That it is broader in its prohibitions does not invalidate it.

—State v. Brothers, 337, 342.

7. The statute expresses a purpose to provide for the enforcement of the act of Congress commonly known as War Prohibition. This does not limit the operation of the statute to the matters prohibited by the act of Congress, if, by its terms, it is broader than the act of Congress. The state statute is a separate, complete and independent act.

—State v. Hosmer, 342, 345.

8. The statute prohibits the transportation of liquor whether for purposes of sale or otherwise, medicinal and other permitted purposes excepted.

—State v. Brothers, 337.

INTOXICATING LIQUOR—Continued.

9. The prohibitions of our statute are not limited to liquors manufactured from grains, cereals, fruit, or other food products.
—State v. Hosmer, 343.
10. The statute forbids the manufacture of intoxicating liquor for the private use of the manufacturer.
—State v. Hosmer, 343, 347.
11. The words "for sale" in the State Prohibition Act were intended to qualify only the words "the keeping or having in possession." To hold that they qualify the same words as used in the earlier part of the sentence would result in manifest absurdity.
—State v. Hosmer, 347.
12. It is not necessary, in an indictment under our statute, to allege that the liquor was potable as a beverage. That liquor manufactured to be used as a beverage is potable, that is, drinkable, is necessarily implied.
—State v. Hosmer, 343.

JUDGMENT.

Upon Pleadings. See Pleading, 3; Replevin, 1.

By Confession. See Homestead.

By Default. See Justice of Peace, 1.

When Plaintiff May Apply for Modification. See Specific Performance, 2.

Res Judicata. See Drain, 8.

Effect upon After-Acquired Rights.

1. A judgment does not affect after-acquired rights nor preclude a party from availing himself of them. An action for money had and received, to recover money received by defendant after judgment in a former action between the same parties, is not barred by the former judgment unless the principle on which plaintiff now seeks to recover was determined adversely to plaintiff.
—Seastrand v. D. A. Foley & Co. 239.
2. The judgment in the former action did not determine that plaintiff had no right of action under such circumstances.
—Seastrand v. D. A. Foley & Co. 240.
3. Where a court by its judgment determines the construction of a contract between the parties, that construction is final and cannot again be made the subject of litigation between them. The legislature cannot, by subsequent enactment, change the rights of the parties under the contract.
—Seastrand v. D. A. Foley & Co. 239.

JUDGMENT—Continued.

Foreign Judgment a Nullity, so Far as Relates to Attorney's Lien on Cause of Action in Minnesota Court. See Attorney and Client, 6.

Full Faith and Credit.

4. It does not appear from an examination of the record herein that the decision of the trial court is in violation of section 1 of article 4 of the Constitution of the United States.

—Scharmann v. Union Pacific Railway Co. 291.

Stay. See Justice of Peace, 5.

JUDGMENT NOTWITHSTANDING VERDICT. See Contract, 2; Railway, 8.

1. By moving for judgment notwithstanding the verdict but not for a new trial, defendant waived all questions except its contention that the verdict is without support in the evidence.

—Nichols v. Klissel Motor Car Co. 137, 139.

2. The complaint stated a cause of action for money had and received. The testimony admitted tended to prove a contract for the payment of money, and the court, after ordering the pleadings amended to conform to the proof, charged the jury that, if they found such contract to have been made, plaintiff should recover. There was a verdict for plaintiff. It is held that, in granting defendant's motion for judgment notwithstanding the verdict, the court erred

(1) In so far as the order was based upon the ground that no recovery on contract could be had under the complaint.

(2) On the ground that there was no evidence to sustain a recovery under the law as given in the charge.

—Wampa v. Lyshik, 274.

JURY.

Right to Jury Trial Not Presented by Record. See Appeal and Error, 16.
Assessment of Benefits and Damages in Ditch Proceeding by Jury Trial. See Drain, 7.

JUSTICE OF PEACE.

Appeal to District Court.

1. Section 7887, G. S. 1913, gives an appeal to the district court from an order made by a justice of the peace under section 7871, denying an application for relief from a default judgment in garnishment proceedings.

—State ex rel. v. Kane, 226.

Notice of Appeal.

2. Unless the notice of appeal from a judgment rendered by a justice of the peace states upon which one of the two allowable grounds it

JUSTICE OF PEACE—Continued.

is taken, no jurisdiction is acquired by the appellate court, and the latter has no power to amend the notice.

—*Spicer v. Kennedy*, 158.

3. After the time has expired nothing can be done to remedy a defect in the documents necessary to perfect an appeal from justice court.

—*Spicer v. Kennedy*, 160.

Special Appearance.

4. By asking for that only which the statute authorizes the court to grant on a dismissal for lack of jurisdiction, there was no general appearance; nor was there such appearance by the admission of service of plaintiffs' notice of motion to amend the notice of appeal and by opposing the granting of the motion.

—*Spicer v. Kennedy*, 159.

5. Such appeal, when taken in the form and manner prescribed for appeals from justice court in civil actions, will stay all proceedings looking to the enforcement of the judgment from which relief is sought pending the appeal.

—*State ex rel. v. Kane*, 226.

6. The statute, however, expressly authorizes, but does not require, the appellate court to enter judgment affirming the judgment of the justice court where for any cause the appeal is dismissed.

—*Spicer v. Kennedy*, 159.

Certiorari from Supreme Court.

7. Except in special instances and when public interests are involved the supreme court will not issue a writ of certiorari to a justice court, in review of a judgment or order there rendered, but will refer the parties to the court having direct appellate jurisdiction of such court.

—*State ex rel. v. Kane*, 225.

LANDLORD AND TENANT.

Possession Originating in Tenancy Presumably Not Hostile. See *Adverse Possession*, 2.

Exception to Rule Requiring Tenant to Remove Removable Fixtures before End of Term. See *Fixture*, 7.

When Gas Ranges and Door Beds Installed in Flats in Apartment House by Holder of Ground Lease Pass as Fixtures to Owner of Realty. See *Fixture*, 4, 6.

Liability to Servant of Tenant for Breach of Covenant.

1. A lessor, who leases property with a covenant to keep it properly heated, is liable to an employee of his tenant for a negligent fail-

LANDLORD AND TENANT—Continued.

ure to heat properly. Following *Glidden v. Goodfellow*, 124 Minn. 101, 144 N. W. 428.

—*Hansman v. Western Union Telegraph Co.* 56.

2. The evidence sustains a finding that the defendant telephone company negligently failed to heat properly premises leased to the telegraph company in the employ of which the plaintiff was.

—*Hansman v. Western Union Telegraph Co.* 56.

3. The evidence does not require a finding that the plaintiff was at fault in caring for herself, or in remaining at work under the conditions to which she was subjected while working for the telegraph company, so as to prevent a recovery from the telephone company for its negligent failure to heat.

—*Hansman v. Western Union Telegraph Co.* 56.

Cropping Contract.

4. Action for an accounting of crop raised under a cropping contract on land owned jointly by plaintiff and defendant. Findings in favor of plaintiff. Held: The findings of fact are sustained by the evidence.

—*Boyea v. Besch*, 254.

LANTERN. See Negligence, 1.

LARCENY. See Criminal Law, 25.

LETTER.

Presumption that Where Letter, Postage Paid and Properly Addressed, Was Deposited in the Mail, It Reached Its Destination. See Insurance, 12.

Letter to Post Office Department Libelous Per Se. See Libel and Slander, 3.

Acceptance of Order in Five Separate Letters on Blank Forms. See Contract, 1.

Of Inquiry by Attorney of Intending Mortgagee Concerning Former Owner's Interest in Land. See Estoppel, 2.

Giving Notice of Loss or Injury under Insurance Policy. See Insurance, 6, 12, 15.

Letters Admissible in Evidence for Sole Purpose of Fixing Date. See Trial, 2.

Letter from Principal to Agent Excluded. See Principal and Agent, 1.

LIBEL AND SLANDER.

1. A false written charge made to the post office department that a rural mail carrier was threatening the boys of draft age along his

LIBEL AND SLANDER—Continued.

line that they would be sent to France if they joined the Nonpartisan League is libelous per se.

—Hrdlicka v. Warner, 277.

2. Evidence that the mail carrier made to others than those included within the charge threats of the character stated, there being nothing to show that they were or likely would be communicated to the boys of draft age, did not support the truth of the charge, which was the defendant's defense; and a written statement, made by the only boy whom the defendant claimed to the investigating authorities of the post office department had been so threatened, to the effect that he had not been threatened, if erroneously received, was harmless. It was in proof of the falsity of the charge. There was no evidence of its truth, of which the burden of proving lay upon the defendant; and the jury was properly charged that as a matter of law the charge was untrue.

—Hrdlicka v. Warner, 277.

3. Threats of the kind charged, made by one in the position of mail carrier, constituted wrongdoing and misconduct, and a charge that he made them necessarily disparaged him in his calling and lessened him in public esteem. Within the Minnesota decisions the letter to the post office department was libelous per se.

—Hrdlicka v. Warner, 278.

4. There was evidence of actual malice which justified the submission of the question of punitive damages.

—Hrdlicka v. Warner, 277.

LICENSE.

Municipality Not Liable for Damages Sustained by Wrongful Revocation of a License. See Municipal Corporation, 19.

LIEN. See Convict, 3; Homestead; Mechanic's Lien; Vendor and Purchaser, 1.

Of Attorney upon Cause of Action Arising under Federal Employer's Liability Act. See Attorney and Client, 5.

For Wages for Labor upon Timber Products. See Log and Logging, 4-6.

LIS PENDENS.

Failure to File Notice of Lis Pendens in Foreclosure of Mechanic's Lien. See Appeal and Error, 5.

LIVERY STABLE AND GARAGE KEEPER. See Garage Keeper.

LOG AND LOGGING.

1. One of the provisions of a timber deed was that the grantee should cut and remove the timber within 15 years from the date of the

LOG AND LOGGING—Continued.

deed, and that during that time and as long as the timber was not cut he should have the exclusive right to occupy the lands on which the timber was located and should pay all taxes which fell due prior to the cutting of the timber. Held, that the grantor in such deed had a contingent reversionary interest in the timber, which he might convey or reserve to himself in a deed of the land subsequently executed.

—International Lumber Co. v. Staude, 356.

Reservation in Timber Deed.

2. In 1900 Sheldon and another conveyed the timber on certain lands by deeds which provided that the timber should be removed from the land within 15 years, and that the grantee of the timber should have the exclusive right to occupy the land. He was required to pay all taxes which became payable prior to the cutting of the timber. The price paid was over \$9 per acre. Thereafter Sheldon acquired title to the whole of the land and in 1904 he and his wife conveyed all the land by deed to a land company, which paid about \$3.33 per acre, and its grantees are the original defendants in this action. Sheldon and his wife subsequently intervened therein. This last deed was made subject to the "incumbrances, limitations and reservations hereinafter specified." Then follows a clause: "It is understood that the timber upon a large portion of said lands has been sold" under deeds with various periods, usually 20 years, for the removal of such timber, "and said lands are conveyed subject to the provisions of such warranty timber deeds." The parties of the first part "reserve the right to remove at any time from the date of this deed any and all" timber from all the lands above described. In case title failed to any part of the land, a deduction of two dollars per acre was to be made. It was contemplated that the several owners of the timber would remove it. Plaintiff acquired title from the grantee of the 1900 timber deeds. In 1914 by formal instrument in writing Sheldon and wife extended the time within which plaintiff might remove the timber to May 31, 1925. Held:

(1) The words "from all lands above described" are construed to mean that as to the lands covered by the timber deeds, nothing remained to which the reservation could attach.

(2) The timber in question, being a part of the realty and not included in the reservation in the deed to the land company, as a matter of law passed to the owner on default of the holder of the timber deed to cut and remove the timber.

(3) The decision of the trial court that Sheldon had conveyed to

LOG AND LOGGING—Continued.

the land company his reversionary right in certain of the lands is sustained.

—International Land Co. v. Staude, 356.

3. A deed of timber lands, part of which were covered by outstanding timber deeds, contained a clause granting the land subject to the provisions of the timber deeds, and another clause reserving to the grantor the timber on all the land described in his deed. Held, that the reservation clause should be construed to apply only to timber which had not already been sold and conveyed.

—International Lumber Co. v. Staude, 357.

Lien for Wages on Timber Products.

4. The lien statute of 1899 (c. 342, p. 432), is complete in itself. It is in the nature of a special act designed to cover a particular class of work.

—Sheldon v. Padgett, 143, 144.

5. In perfecting a lien statement for wages for labor upon timber products under the provisions of section 7059, G. S. 1913, where the timber products are not all marked by registered log marks, it is sufficient to attach the original assignments of the claims to the statement filed in the office of the surveyor general of logs and lumber, and copies of such assignments to the statement filed with the clerk of the district court of the county.

—Sheldon v. Padgett, 141.

6. In an action to enforce a lien for wages for labor upon timber products, claimant is, under the provisions of section 7067, entitled to recover \$10 statutory costs, and in addition thereto \$20 attorney's fees.

—Sheldon v. Padgett, 142.

Assignment of Wages for Labor on Timber Products. See Assignment, 1, 2.

MALICE. See Libel and Slander, 4; Malicious Prosecution, 2.

MALICIOUS PROSECUTION.**Definition of Probable Cause.**

1. Probable cause has been defined as the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the offense for which he was prosecuted.

—Buhner v. Reusse, 452.

MALICIOUS PROSECUTION—Continued.**Want of Probable Cause.**

2. In an action for malicious prosecution, plaintiff must prove both malice and want of probable cause. Even though actual malice be proven, the action must fail, if there was probable cause for the prosecution. Want of probable cause cannot be inferred from existence of actual malice.

—Buhner v. Reusse, 451.

3. When in a suit for malicious prosecution the facts relating to want of probable cause are undisputed, the question whether it has been established is for the court.

—Buhner v. Reusse, 451.

4. A resident of the village of Fulda was prosecuted for violation of an ordinance requiring a license from transient merchants because he peddled apples from a car of apples shipped to him as it stood on a side track, and he was found guilty in justice court. On appeal to the district court he was acquitted. In this action against the village marshal, who swore to the complaint against him, and the village president who directed the marshal to make the complaint, plaintiff failed to show want of probable cause, and the court did not err in granting defendants' motion for a dismissal.

—Buhner v. Reusse, 450.

Evidence of Probable Cause.

5. A conviction of plaintiff which was reversed on appeal, and plaintiff discharged, is not conclusive, but is strong prima facie evidence of probable cause in a suit for malicious prosecution.

—Buhner v. Reusse, 451.

MANDAMUS. See Appeal and Error, 2.

1. Mandamus will lie to reinstate an officer or appointee unlawfully removed from his position, where it clearly appears as a matter of law from the undisputed facts that he was entitled to retain such position.

—State ex rel. v. Wunderlich, 373.

2. While mandamus will lie to reinstate an appointee removed in violation of law, it will not lie to reverse the decision of an officer empowered by law to determine as a matter of fact whether cause for removal existed.

—State ex rel. v. Wunderlich, 368.

3. The commissioner of education having removed the relator in the exercise of the power vested in him by the charter and having followed the procedure prescribed by the charter for making such

MANDAMUS—Continued.

removals and the reasons assigned for the removal being sufficient to justify it, his decision cannot be reviewed by mandamus.

—State ex rel. v. Wunderlich, 368.

No Appeal from Order Granting or Denying Motion for Judgment upon Pleadings. See Appeal and Error, 2.

MARRIAGE.

1. The legislature not having prescribed epilepsy as a ground for annulment of marriage, and the courts of the state never having recognized that disease as a cause for nullifying a marriage contract, the judgment of the trial court denying such relief is justified, notwithstanding a finding of fact that the defendant was an epileptic at the time of the marriage.

—Behsman v. Behsman, 95.

2. In an action to annul a marriage contract upon the ground that one of the parties thereto was an epileptic at the time of the marriage, proof that the defendant was an epileptic at the time of such marriage is not, in the absence of a showing of fraud on the part of the afflicted party in concealing the epileptic condition, sufficient to warrant a decree of annulment.

—Behsman v. Behsman, 95.

MASTER AND SERVANT.

Workmen's Compensation Act. See Workmen's Compensation Act.

Contract of Employment. See Attorney and Client, 4; Master and Servant, 1.

1. The evidence is sufficient to sustain a finding by the jury that there was a contract of employment between plaintiff and defendant, and that plaintiff was entitled to recover the reasonable value of services rendered and expenses incurred in its performance.

—Stanger v. Pandolfo, 294.

Respondent Superior. See Charitable Corporation, 2.

Negligence of Foreman.

2. The plaintiff was engaged in thawing out ore in an ore pocket in the defendant's dock, using a hose which extended over the rail of a track. The foreman told him that a train was coming in on his track, and to take out the hose. It was his duty to take out the hose when a train came in on the track on which he was working, and this he would do without a direction when he saw a train coming. While endeavoring to take out the hose, moving hurriedly, it being night-time and the atmosphere misty because of the accumulated steam, he made a misstep and fell into the ore

MASTER AND SERVANT—Continued.

pocket and was injured. It is held that the direction of the foreman was not negligent.

—Hansen v. Duluth & Iron Range Railroad Co. 330.

Assumption of Risk. See Charitable Corporation, 2(2).

3. Where a telephone operator's work is performed for months in a room nearly constantly cold and unfit for occupancy for her work, it cannot be said as a matter of law that she should have abandoned her work because of the failure to heat.

—Hansman v. Western Union Telegraph Co. 58.

4. In an action by a carpenter against his employer to recover damages for illness claimed to have been caused by inhaling disease germs, while at work relining the walls of a room where fur garments were stored, as the result of the alleged negligence of the master in failing to notify the plaintiff of the dangerous condition of such room, held, that the court was justified, under the evidence, in directing a verdict for the defendant.

—O'Reilly v. Powers Mercantile Co. 261.

Negligent Use of Automobile by Servant for His Own Pleasure.

5. This court sanctions the doctrine that the head of a family, who provides for the recreation of the members of his family by furnishing an automobile for their use and pleasure, is responsible for its negligent use by any one of the family having his permission to drive it. The doctrine is a development of the rules applicable to the relation of master and servant and principal and agent, and is not to be extended to cases where an employer permits a favored employee to use, for his own pleasure, an automobile kept and ordinarily used in carrying on the employer's business.

—Mogle v. A. W. Scott Co. 173.

Negligent Use of Motor by Servant for His Own Pleasure.

6. An employer is not liable for the negligence of his employee, who took his automobile to drive out to a park with his family on a holiday, when his time did not belong to his employer, and negligently ran down and injured a person at a street intersection, even though he had his employer's permission to take the automobile.

—Mogle v. A. W. Scott Co. 174.

7. Action for injury to plaintiff caused by negligent driving of defendant's automobile by its servant, while in use in the performance of the purpose for which it was kept. Plaintiff's offer to show by his witness that defendant Scott stated to him, in connection with the insurance of the car, that the servant in question was allowed to use it for pleasure of his family on Sundays and in the

MASTER AND SERVANT—Continued.

evening was, under the allegations of the complaint, properly denied by the court.

—Mogle v. A. W. Scott Co. 175, 177.

MAXIM.

De Minimis. See Appeal and Error, 27.

MECHANIC'S LIEN.

Failure to File Notice of Lis Pendens. See Appeal and Error, 5.

Voluntary Appearance in Foreclosure Action Equivalent of Service of Summons upon Person Appearing. See Appearance, 1.

1. It is well settled in Minnesota that improvements upon real estate, such as the repair of a heating plant, are presumed to be made upon authority from the legal owner of the premises. G. S. 1913, § 7024.

—L. J. Mueller Furnace Co. v. Bahneman, 121.

Execution of Statement.

2. The lien statement was in the usual form, but was not signed immediately above the verification. The verification after the venue read: "Harry H. Miller of said county being duly sworn, says he is the manager," etc. and his name was signed immediately below the verification and above the jurat. Held: The execution of the lien statement was sufficient.

—L. J. Mueller Furnace Co. v. Bahneman, 121.

Assertion of Claim by Pleading.

3. A lien claimant may assert a mechanic's lien by answer in an action brought by another lien claimant to foreclose its lien on the same property, and may enforce its lien in such action as to all persons who are made parties thereto within one year from the date of furnishing the last item mentioned in its lien statement.

—Carr-Cullen Co. v. Cooper, 380.

One Lien Statement for Six Houses.

4. Cooper, a contractor and builder, began to erect six dwelling houses on eight adjoining lots, dividing them so that each house occupied a portion of two lots. The construction of the houses was prosecuted as one job until he sold out to the Colfax Holding Company. Appellant furnished the lumber and building materials at an agreed price. They were delivered as ordered from time to time and it billed them under the heading "Job 50th and Colfax," the houses being located on those two streets. No separate account was kept of the materials which were used in each house, but on the receipts obtained from Cooper's foreman by the truckman was

MECHANIC'S LIEN—Continued.

entered the street number of the house at which each load was delivered. Held:

(1) The evidence required a finding that the materialman contributed to the erection of the houses under one general contract and had a right to file one lien statement for its entire claim, embracing all the lots, as provided by section 7027, G. S. 1913.

(2) The amount of its claim should be apportioned among the several owners of the houses so that the lien against each of the six parcels into which the eight lots were divided would be limited to the sum which the court found to be the value of the materials which entered into the construction of the house located thereon.

—Carr-Cullen Co. v. Cooper, 380, 386.

Evidence.

5. Action to enforce a mechanic's lien. Evidence of an agreement signed by the credit man of the trustee in bankruptcy who was on close terms with the buyer, at a time of rising prices, to sell "at prices of today, provided we get all the business." The writing was not called to the attention of the trustee or anyone connected with him, until the trial. Evidence that the invoices were made at reasonable value prices, to which no objection was made. Held to sustain a finding that certain materials were furnished on the basis of reasonable value and not at a price fixed by special contract.

—Hydraulic Press Brick Co. v. Mortgage Land Investment Co. 24.

6. The evidence sustains a finding that certain boilers and fixtures were accepted and were substantially of the character sold.

—Hydraulic Press Brick Co. v. Mortgage Land Investment Co. 24.

7. Testimony considered, and held sufficient, coupled with the presumption flowing from the undisputed facts, to sustain a finding that the improvement to real property was made with the knowledge and consent of the owner in fee of the premises.

L. J. Mueller Furnace Co. v. Bahneman, 120.

8. In this action to foreclose a mechanic's lien, the evidence sustains the findings that plaintiffs had substantially performed their contract to build a house and barn for \$900, so that what small defects existed could be remedied at a cost of not to exceed \$25; that the time for completing the contract had been waived by defendant; and that certain extra work had been done for which additional compensation should be made.

—Middelstadt v. Kostendick, 319.

MECHANIC'S LIEN—Continued.

9. The evidence did not require a finding that the lien claimant in his statement "knowingly demanded in such statement more than is justly due" and thereby was deprived by G. S. 1913, § 7085, of a lien.

—Hydraulic Press Brick Co. v. Mortgage Land Investment Co. 24.

10. The owner of the premises was a corporation. It did not appear what officer or person was in charge of them, nor whether such person had actual knowledge of the improvement for which a lien was filed. Held: The testimony of the president of the owner company that he never made a contract with Bahneman for the improvement in question, that he never knew of the furnishing of the firepot and dome for the heating plant on the premises, does not necessarily overcome the findings of the court that the material was furnished and the improvement made with the knowledge and consent of the owner of the property.

—L. J. Mueller Furnace Co. v. Bahneman, 121.

Attorney's Fee.

11. There was no abuse of discretion in allowing \$65 as attorney's fees for foreclosing the lien. The amount awarded for work actually performed only appears large when considered in connection with the smallness of the lien claimed. Defendants presented many defensive issues which they tenaciously sought to maintain.

—Middelstadt v. Kostendick, 321.

MEMORANDUM.

Of Trial Judge. See Appeal and Error, 18.

MINE AND MINERAL.

Action on Check Given to Plaintiff for Expense of Examining Mine in Case Defendant's Report Thereon Was Not Substantially Corroborated. See Contract, 9.

MISTAKE. See Account Stated; Specific Performance, 2.

When Mistake of One Party to Contract May Be Ground for Refusing Specific Performance. See Specific Performance, 3(1).

MONEY HAD AND RECEIVED. See Contract, 2; Drain, 8; Judgment, 1; Judgment Notwithstanding Verdict, 2.

1. It is not necessary that plaintiff should ever have had the so-called legal title to the money. The one essential condition is that, in equity and good conscience, it belongs to plaintiff.

—Seastrand v. D. A. Foley & Co. 239.

2. Plaintiff, a subcontractor, in good faith performed extra work in construction of a drainage ditch. He sued defendant, the contrac-

MONEY HAD AND RECEIVED—Continued.

tor, for the price of the extra work. The court held that the amount of extra work was in excess of what the county could pay under the law, and that defendant's contract did not obligate it to pay plaintiff therefor. Later, a law was passed, permitting such payment and the county then made payment to defendant for the full value of the work performed by plaintiff. Held, that plaintiff may recover in an action for money had and received.

—*Seastrand v. D. A. Foley & Co.* 239.

3. The complaint states a cause of action for money had and received. The gist of this action is that defendant, upon the facts of the case, has received money which by the ties of natural justice and equity he should pay to plaintiff.

—*Seastrand v. D. A. Foley & Co.* 239.

MORTGAGE.

Subordinate to Lien for Purchase Price. See Vendor and Purchaser, 1.
Action to Cancel Mortgage to Secure Debt Incurred by Gambling in Wheat Options. See Gambling, 2.

Upon Homestead by Mortgagee of Fraudulent Grantee of Husband and Wife. See Estoppel, 1, 2.

Separate inquiry of the wife, on the facts here disclosed, was not necessary.

—*Havel v. Costello*, 442, 446.

Foreclosure.

Of Mortgage upon Homestead. See Contract, 2.

By Advertisement Not Stayed by the Soldiers' and Sailors' Civil Relief Act. See Army and Navy.

MOTION.

Admission of Service of Notice of Motion Not Held to Be General Appearance in the Action. See Appearance, 2.

MOTOR VEHICLE. See Automobile.

MUNICIPAL CORPORATION.

On Appeal to Supreme Court No Appeal Bond Necessary. See Bond.

Ordinance. See Municipal Corporation, 6; Street Railway, 4, 5.

Court Takes Judicial Notice of Village Ordinance. G. S. 1913, § 7773.
See Evidence, 1.

Violation of Village Ordinance Requiring License from Transient Merchants. See Malicious Prosecution, 4.

Not Liable for Acts of Municipal Officers Done under Void Ordinance.
See Municipal Corporation, 20.

1. A village ordinance prohibited the parking of automobiles within

MUNICIPAL CORPORATION—Continued.

20 feet of a hydrant. The purpose of the ordinance was to keep the hydrant accessible for quick use in case of need.

—Denson v. McDonald, 253.

2. Obligations arising under the old street car franchise and not yet discharged by the car company will not become discharged by operation of law or otherwise without performance.

—Meyers v. Knott, 204, 205.

Police.

3. Under the home-rule charter of St. Paul neither a school teacher nor a policeman can be removed arbitrarily; either may be removed for cause; the method of removal is the same in both cases. While the charter places teachers in the unclassified service and policemen in the classified service, and authorizes the adoption of civil service rules and regulations for the government of the classified service, the fact that it also provides that the charter requirements must be complied with before persons in the classified service can be removed makes their tenure at least as secure as that of teachers.

—State ex rel. v. Wunderlich, 373.

Removal of Appointive Officer. See **Municipal Corporation**, 3; **School and School District**, 7-9.

Servant in Classified Service Entitled to Salary after Wrongful Exclusion from Office.

4. Within the rule stated and applied in *Markus v. City of Duluth*, 138 Minn. 225, 164 N. W. 906, it is held that the evidence justified the jury in finding that plaintiff was wrongfully excluded from his employment, which was protected by the municipal civil service regulations, and that he did not acquiesce in such exclusion or abandon the position held by him.

—Gude v. City of Duluth, 109.

Use of Street by Automobile. See **Appeal and Error**, 25.

By Railway. See **Railway**, 6.

5. A street car, going east to St. Paul, had stopped on University avenue, after crossing an intersecting street, to discharge and take on passengers. An ice wagon was crossing the avenue on the intersecting street and a truck, headed toward Minneapolis, was standing on the north side of the avenue. Defendants' automobile, going west toward Minneapolis, on approaching the intersecting street, turned to pass between the car and the truck. As the machine cleared the truck, the driver first saw decedent hurriedly crossing the street toward the street car. The street was wet and slippery and, while trying to avoid striking decedent,

MUNICIPAL CORPORATION—Continued.

the motor skidded and struck him down. The evidence as to the speed of the motor was conflicting. **Held:** The evidence upon the question of negligence and contributory negligence sufficiently supports the verdict against defendants.

—Plasch v. Fass, 44, 46.

6. An ordinance of the village prohibited the parking of an auto within 20 feet of a hydrant. That the plaintiff's auto was so parked did not prevent a recovery.

—Denson v. McDonald, 252.

7. The evidence sustains the finding of the court that the defendant negligently ran its loaded auto truck into the auto of the plaintiff which was parked along the side of a village street.

—Denson v. McDonald, 252.

8. The evidence sustains a finding of the jury that the defendant, whose auto came into collision with the plaintiff, was negligent; and it was not such as to require a finding that the plaintiff was negligent.

—Allen v. Johnson, 333.

9. There was no error in calling the attention of the jury to the dangers attendant upon the use of an automobile, when explaining the care required, and the charge was not to the effect that an auto is a dangerous instrumentality.

—Allen v. Johnson, 333.

10. There was no error in instructing as to the duty of a driver to give warnings, nor in reading a portion of G. S. 1913, § 2632, relative to the duties of a driver when approaching a pedestrian or a street intersection.

—Allen v. Johnson, 333.

11. There was no error in refusing to give requested instructions upon contributory negligence nor the relative rights of an auto and a pedestrian in a street; both matters being covered by the general charge.

—Allen v. Johnson, 333.

12. There was no prejudicial error in instructing the jury that the defendant claimed that the plaintiff walked in front of his auto and was injured, although his claim was that he walked into it.

—Allen v. Johnson, 334.

13. In action for personal injuries, suffered by plaintiff as a result of a rear end collision with an auto truck by a motorcycle, driven by him, which collision was caused by the sudden slackening of the speed of the truck in turning the same around in the middle of

MUNICIPAL CORPORATION—Continued.

the block, without notice by extending the hand of the operator or otherwise, it is held, following *O'Neil v. Potts*, 130 Minn. 353, 153 N. W. 856, that the evidence supports the verdict.

—*Stapp v. Jerabek*, 439.

14. In an action for the wrongful death of plaintiff's intestate, caused by being run over by an automobile negligently operated by defendant, after she had jumped to the street from a carriage driven by runaway horses, the evidence is held to support the verdict, and that there was no reversible error in the rulings of the court in the admission or exclusion of evidence.

—*Bursaw v. Plenge*, 459.

15. Late at night plaintiff walked south along the west side of Washington avenue in Minneapolis and crossed to the south curb of Fourth avenue which crosses Washington avenue at right angles. He then turned around and started back toward the north curb of Fourth avenue. After turning he saw defendant's cab on Washington avenue, 30 feet north of the street intersection, proceeding south. He did not look again and did not hear any warning signal until he was struck by it. The driver claimed he sounded his horn as he approached the corner. Held:

(1) The evidence made the questions of defendant's negligence and plaintiff's contributory negligence for the jury. The court cannot say as a matter of law that plaintiff, hearing no warning as he testified, was negligent in assuming that the cab would continue in the direction it was going when he saw it.

(2) As the cab was not coming toward plaintiff when he saw it and he did not see it after it turned in his direction, it does not follow that failing to sound the horn was not the proximate cause of the accident. The court did not err in charging the jury that, if the driver failed to sound his horn on approaching plaintiff, he was chargeable with negligence in failing to comply with this statutory requirement.

(3) The verdict of \$1,200 was not excessive.

—*Offerman v. Yellow Cab Co. Inc.* 478.

16. A person riding in a touring car at the invitation of the owner along wide, level, paved and dry streets at an hour of the evening when there is comparatively little driving on down town streets, who was not driving and had no control over the driver, is not guilty of contributory negligence, if the driver collides with another car, as a matter of law, because she rode for several blocks at a speed of 15 or 20 miles an hour, without making any protest.

MUNICIPAL CORPORATION—Continued.

Section 2635, G. S. 1913, as amended, does not make a speed of more than ten miles an hour conclusive of negligent or excessive speed.

—Holland v. Yellow Cab Co. Inc. 476.

Not Liable in Damages for Exercise of Discretionary Powers.

17. It is well settled that a municipal corporation cannot be held in damages for the manner in which it exercises the discretionary powers of a public, legislative or quasi-judicial nature. While engaged in the discharge of duties imposed upon it, from the performance of which it derives no compensation or benefit in its corporate capacity, it is clothed with the immunities of the state.

—Roerig v. Houghton, 233.

18. Neither a municipal corporation nor its administrative officers are liable in damages suffered by third persons in consequence of judicial proceedings conducted in behalf of the municipality in the exercise of its governmental functions.

—Roerig v. Houghton, 231.

19. A municipality is not liable for damages sustained by reason of a wrongful revocation of a license or permit.

—Roerig v. Houghton, 234.

20. Municipal liability is not created because the acts of municipal officers were done under a void ordinance, if the ordinance was enacted in the exercise of governmental powers.

—Roerig v. Houghton, 234.

Statutory Notice of Claim for Damages.

21. Section 1786, G. S. 1913, requires notice to be given where damages are claimed on account of a defect in a public way or place, which is within the exclusive control of a city or village, or by reason of the negligence of any of its officers, agents or servants.

—Nienow v. Village of Mapleton, 63.

22. Section 1786, G. S. 1913, does not apply to an action brought to recover damages and enjoin the continuance of a nuisance caused by a village permitting sewage to be deposited on plaintiff's land.

—Nienow v. Village v. Mapleton, 60.

Abatement of Nuisance Caused by Sewer.

23. Plaintiff was entitled to an injunction upon findings by the jury that at the time of the commencement of the action, and since its commencement, and at the time of the trial, the defendants maintained a nuisance upon or in the immediate vicinity of plaintiff's farm; the court having denied defendants' application to vacate such findings.

—Nienow v. Village of Mapleton, 60.

MUNICIPAL CORPORATION—Continued.**Injunction against Holding Franchise Election.**

24. A suit by a taxpayer will lie to restrain the holding of an election for the adoption of an ordinance granting a street-railway franchise on the ground that the ordinance submitting the question to the voters had not been presented to the mayor for his approval or veto.

—Meyers v. Knott, 202.

NAME.

Person of Business Reputation May Lend Name to Corporation Organized to Take Over His Business, When. See Trade-Mark and Trade-Name, 2.

When Name of Commodity Maker or Dealer Immaterial in Deciding Question of Unfair Competition. See Trade-Mark and Trade-Name, 1. Dissimilarity in Names. See Trade-Mark and Trade-Name, 3-5.

NAVIGABLE WATER.

Drainage of Meandered Lake. See Drain, 1, 2.

NEGLIGENCE. See Bills and Notes, 3.

Foolhardy Negligence. See Criminal Law, 23.

Culpable Negligence.

Infliction of Death by Culpable Negligence Constitutes Manslaughter in Second Degree. See Criminal Law, 22.

Care Required of a Scrivener, Not a Lawyer, Employed to Draw Deeds on Exchange of Property. See Fraud, 2.

Charitable Corporation Not Exempt from Consequence of Negligence in Selecting Employees. See Charitable Corporation, 2.

Of Private Hospital in Care of Patient. See Hospital, 1, 3.

Of Foreman on Ore Dock. See Master and Servant, 2.

Of Keeper of Public Garage. See Garage Keeper, 1-4.

Of Driver of Automobile. See Municipal Corporation, 5, 7, 8, 10, 13, 15.

Of Taxicab Driver Who Struck Pedestrian when Turning Street Corner. See Municipal Corporation, 15.

Of Wife in Operation of Family Car. See Husband and Wife, 2.

Proximate Cause of Injury. See Municipal Corporation, 15(2).

Proximate Cause of Death. See Criminal Law, 20.

Contributory Negligence. See Municipal Corporation, 16.

Of Employee in Remaining at Work in Cold Room. See Landlord and Tenant, 3.

Of Pedestrian. See Municipal Corporation, 5, 8, 11, 12.

Of Driver of Automobile at Railway Crossing. See Railway, 4.

Of Passenger in Automobile. See Railway, 2.

NEGLIGENCE—Continued.

1. One who during a dark evening attempts to pass along a well beaten road with which he is familiar and near which he has no reason to believe any pitfalls exist, is not, as a matter of law, negligent, if he is not equipped with a lantern.

—McDonald v. Cuyuna Range Power Co. 273.

Question for Jury.

2. In order to install running water in a dwelling house on defendant's property, it dug trenches some six feet in length and three feet in width, at intervals of some ten feet, between its water-tank and the house, which were 75 feet apart. A traveled trail or private road-way diverged from a public road and ran across defendant's land between the house and the water-tank. In the evening plaintiff fell into one of these trenches and claimed damages. Held: Neither defendant's freedom from the negligence charged nor plaintiff's contributory negligence appeared as a matter of law, and it was error to direct a verdict in favor of defendant.

—McDonald v. Cuyuna Range Power Co. 271.

NEW TRIAL. See Trial, 3.

Effect of Failure to Assign Error in Motion for New Trial. See Appeal and Error, 6, 10, 11.

Certain grounds for a new trial considered, and held without merit.

—Wade v. National Bank of Commerce, 189.

NOTICE.

To True Owner of Hostile Character of Adverse Possession. See Adverse Possession, 1.

Admission of Service of Notice of Motion Held Not to Be General Appearance in the Case. See Appearance, 2.

To Purchaser of Note to Put Ordinarily Prudent Man upon Inquiry. See Bills and Notes, 2.

Posted on Public Garage Disclaiming Liability in Case of Theft. See Garage Keeper, 5.

From Insured to Insurer.

Of Injury under Policy. See Insurance, 6, 15.

Of Death of Insured. See Insurance, 12.

Amendment of Notice of Appeal from Judgment of Justice Court. See Justice of Peace, 24.

Statutory Notice of Claim for Damages against Municipal Corporation. See Municipal Corporation, 21, 22.

NUISANCE. See Intoxicating Liquor, 4; Municipal Corporation, 23, 24.

OFFER AND ACCEPTANCE. See Contract, 1.

OFFICER.

Mandamus Will Not Lie to Reverse the Decision of an Officer Authorized to Determine whether Cause for Removal Existed. See *Mandamus*, 2.

1. A public officer, whose functions are judicial or quasi judicial, cannot be called on to respond in damages for the honest exercise of his judgment within his jurisdiction, however erroneous his judgment may be.

—*Roerig v. Houghton*, 234.

Municipal Administrative Officers Not Liable in Damages to Third Persons from Judicial Proceedings Conducted in Behalf of Municipality. See *Municipal Corporation*, 18.

2. A public officer or agent, engaged in a public duty in obedience to the command of a statute, should not suffer personally for an error in judgment. The judicial character of his act rather than the judicial character of his office, furnishes the basis of his exemption, if he is exempt.

—*Roerig v. Houghton*, 234.

3. A public officer, exercising ministerial powers only, is liable to one who sustains an injury by his malfeasance, misfeasance or nonfeasance.

—*Roerig v. Houghton*, 234.

Reinstatement of Officer Unlawfully Removed. See *Mandamus*, 1.

OPTION. See Specific Performance, 3.

PARTITION.

Between Stepmother and Stepdaughter. See *Deed*, 3.

PARTNERSHIP.

Contract by Managing Partner.

Where one partner, who has exclusive management of the partnership business, makes a contract on behalf of the partnership, the other partner cannot relieve himself from liability thereon by showing that he had no knowledge of the making of the contract, unless he also shows that it was outside the scope of the partnership business.

—*Kenyon Co. v. Johnson*, 48.

PARTY TO ACTION. See Pleading, 4.

PAYMENT. See Pleading, 1.

Of Preliminary Expenses in Ditch Proceeding by County. See *Drain*, 5.

PAYMENT—Continued.

Effect of Taking Payment of Depositor's Check in Bank Draft or Cashier's Check. See Bills and Notes, 1.

Payment and Delivery Concurrent Acts when Sale is for Cash. See Sale, 5.

Delivery of Grain Sold on Board of Trade in Carload Lots for Cash Conditional on Payment. See Exchange, 2.

Exception to Rule that Buyer's Nonpayment of Instalment of Price Relieves Seller from Making Further Delivery. See Sale, 2(1).

PHYSICIAN AND SURGEON.

Privilege of Witness whether Services Are Gratuitous or Paid for. See Witness, 4.

Practice of Medicine without License. See Criminal Law, 11, 12.

A druggist called as a witness produced 60 prescriptions issued to divers persons in the vicinity, which had been filled at his drug store. They all were dated during the week mentioned in the indictment. The witness testified that these prescriptions all bore the signature of defendant in his own handwriting with the letters M. D. appended thereto. They were all admitted in evidence as bearing on the question of defendant's holding himself out as a practicing physician in the vicinity.

—State v. Bohl, 438, 439.

PLEADING. See Vendor and Purchaser, 3.

Complaint. See Money Had and Received, 3; Replevin, 1.

Complaint Sufficient. See Drain, 8; Judgment Notwithstanding Verdict, 2.

1. The original complaint alleged plaintiff was to receive \$960, of which defendant and Mortenson were each to pay one-half, and that Mortenson had paid \$480, his half. The complaint was then amended so as to assert a demand for only \$480. Held: The complaint as amended did not contain an admission of payment of the claim sued on.

—James E. Carlson, Inc. v. Babler, 127, 128.

Answer.

Assertion of Mechanic's Lien by Answer to Action Brought by Another Lien Claimant. See Mechanic's Lien, 3.

General Denial. See Pleading, 6.

Demurrer. See Drain, 8.

Objection to Overruling Demurrer to Complaint Waived. See Appeal and Error, 11.

Amendment of Complaint. See Broker, 3.

Amendment of Answer. See Judgment Notwithstanding Verdict, 2.

PLEADING—Continued.**Amendment of Answer at Trial.**

2. There was no error in denying the defendant's motion to amend his answer at the trial by specifically denying that the plaintiff was a corporation.

—Licensed Retail Liquor Dealers Association of Minneapolis v. Denton, 81.

Judgment upon Pleadings.**No Appeal from Order Granting or Denying Motion for Such Judgment in Application for Writ of Mandamus. See Appeal and Error, 2.**

3. In 1916 defendant leased of plaintiff an apartment house for the term of 99 years at an annual rental of \$3,000, payable quarterly. Defendant took possession of the premises and made all quarterly payments of rent as they fell due until March, 1918, when he defaulted.

In an action for an instalment of rent, the answer alleged that defendant was induced to enter into the contract by false representations of the owner as to the cost of heating, service and incidentals, specifying the representations in detail; that the owner represented the several apartments were occupied by responsible tenants who paid their rent in advance; that the annual income from the rents was not less than \$3,300 per year, which would leave a net profit to defendant of \$300, when in fact there would be an annual loss to defendant of \$1,100, instead of a profit of \$300. The answer also alleged that defendant relied on the representations and was induced by them to enter into the contract, and by reason of other engagements did not discover the fraud until "several months prior to the commencement of the action," that defendant offered to rescind, but plaintiff declined the offer. But there was no allegation that defendant rescinded in fact by returning the property to plaintiff or otherwise.

On motion of plaintiff the court granted judgment on the pleadings. Held: The court erred.

—Defiel v. Rosenberg, 166.

Striking Out Answer.

4. An assignment of commissions on renewal premiums on policies of life insurance recited that it was made as collateral security for the payment of premium notes which might be indorsed by the assignor to a bank, and that the bank should be entitled to receive such commissions upon giving written notice to the defendant setting forth the amount of plaintiff's obligations. Defendant's answer failed to allege that the bank held any notes on which

PLEADING—Continued.

plaintiff was liable, or that any notice to that effect had been given to defendant. It was within the discretion of the court to strike out that portion of defendant's answer which alleged the making of such assignment, and that the bank, by reason thereof, was a necessary party to the action.

—*Hart v. Lincoln National Life Insurance Co.* 155.

5. Action against the sureties on an appeal bond. The answer of defendant in another action was stricken out and judgment ordered in favor of plaintiff. Defendant appealed from the order striking out the answer and for judgment. The appeal was dismissed by the appellate court and judgment entered therein for costs, which the appellant paid. This action was against the sureties on the appeal bond to recover the amount of the judgment in the trial court. Their answers were general denials, and the trial court made an order striking them out as sham. Defendant appealed from that order. The condition of the appeal bond did not provide for the payment of the judgment in the trial court in case of a dismissal of the appeal. The bond was set out in the complaint. The only effect of the answer was to raise an issue as to whether such a judgment had ever been entered, although it was of record in the court where the action was pending. The liability of defendants could have been determined upon a motion for judgment. **Held:** The answers were properly stricken out.

—*Prinz v. Melin*, 461.

6. Action for goods sold and delivered, the complaint alleging that defendants were indebted to plaintiff. Answer was a general denial. Motion to strike out the answer as sham, supported by affidavits that one of defendants had exhibited to plaintiff's treasurer a list of defendants' creditors showing the amount owed to each, in which plaintiff's debt was shown to be slightly greater than that claimed by the complaint. The counter affidavit of one of the defendants stated that the list was prepared by their bookkeeper, had not been checked, and they did not admit its correctness; that defendants' attorney advised them they had a good defense to the action, "or at least to a portion thereof." **Held:** The court did not err in striking out the answer as sham.

—*Cochran-Sargent Co. v. Foote*, 474.

Specific Examples of Illegal Practices to Be Pleaded.

7. An order requiring defendant to make its answer more definite and certain, by pleading specific instances of unlawful practices on the part of plaintiff, which were known to and relied upon by defend-

PLEADING—Continued.

ant as justification for canceling a contract with him, does not preclude defendant from showing other instances of misconduct by plaintiff which may subsequently come to defendant's knowledge.

—Hart v. Lincoln National Life Insurance Co. 155.

Application to Make Pleading More Definite. See Appeal and Error, 21.

Appeal from Order that Pleading Be Made More Definite or upon Failure to Do This that It Be Stricken Out. See Appeal and Error, 1.

Variance.

8. There was no fatal variance in the description of a promissory note, where the complaint omitted the words "or order," and the more particular description in the answer was admitted in the reply to be correct.

—Wade v. National Bank of Commerce, 191.

POISON.

No Conflict between 1915 Act and Harrison Narcotic Drug Act.

Chapter 260, Laws 1915 (G. S. Supp. 1917, §§ 8965—1 to 8965—5), restricting the manufacture, sale, and dispensing of certain habit forming narcotic drugs, as involved in *State v. Whipple*, 143 Minn. 403, held not in conflict with the act of Congress known as the Harrison Anti-Narcotic Drug Act [U. S. Comp. St. §§ 6287g-6287q], and that the judgment of conviction therein rendered is not unlawful as violative of the paramount legislative power of the Federal Congress or otherwise. Writ of habeas corpus discharged.

—*State ex rel. Whipple v. Martinson*, 206.

POLICE POWER. See Eminent Domain, 6, 7.

POST OFFICE DEPARTMENT. See Libel and Slander, 1-3.

PRINCIPAL AND AGENT. See Replevin, 3.

Insurance Broker. See Insurance, 2, 3.

Scope of Agency of Insurance Broker Not Defined by G. S. 1913, §§ 3297, 3322, and 3607. See Insurance, 1.

Delivery of Deed to Agent for Record. See Deed, 2.

1. Plaintiff was properly permitted to testify to her employment by defendant as his agent to procure certain work to be done for him, and a letter from him to her was properly excluded as being merely a statement of the same facts as were disclosed by his testimony.

—*Stanger v. Pandolfo*, 295.

2. Plaintiff requested a Ladies Aid Society to do sewing in preparing bedding for the hotel. While there had been no direct communication between defendant and any member of the society, an entry in a minute book kept by its secretary which contained a state-

PRINCIPAL AND AGENT—Continued.

ment that the work had been done but not paid for, was rightfully admitted in evidence over defendant's objection, plaintiff having testified that she obtained authority from defendant to employ some one to help in the sewing, that he was informed and knew the members of the society were doing it, and that she acted for him in what she did.

—*Stanger v. Pandolfo*, 297.

3. Evidence that the general manager of defendant company accompanied a deputy sheriff to plaintiff's house to take possession of mortgaged property of plaintiff by virtue of replevin papers, that there was a struggle between plaintiff and the deputy—a powerful man weighing 250 pounds—in which the deputy was victor; that while the struggle was going on the manager was present, took plaintiff's gun away from plaintiff's wife and in no way interfered with the deputy's action. Held: The evidence justified the jury in finding that the deputy, in committing the assault, was acting as the agent and in the furtherance of the business of the person for whom he was serving a summons, and in charging such person with liability therefor.

—*Dalgle v. Summit Mercantile Co.* 178.

Question for Jury.

4. Kissel Motor Car Company, a Wisconsin corporation, manufactured automobiles. Its selling agent for Minnesota was a Minnesota corporation, Northwest Kissel Kar Branch, which did business in St. Paul as Kissel Kar Company, and defendant Lynch was its manager. Plaintiff sued Lynch and the Wisconsin corporation to recover money due him upon the sale of a car for him by Lynch. Held: The evidence was sufficient to make a question for the jury as to whether the company which originally sold the car to plaintiff made the sale as agent of the Wisconsin company.

—*Nichols v. Kissel Motor Car Co.* 138.

PRINCIPAL AND SURETY.

Action against Sureties on Appeal Bond. See Pleading, 5.

PRIVILEGE. See Contempt, 5; Evidence, 7; Witness, 4.

PROCESS.

Summons. See Appearance, 1; Principal and Agent, 3.

QUANTUM MERUIT. See Broker, 3; Mechanic's Lien, 5.

RAILWAY.

1. The railway company was not entitled to be dismissed upon bringing in the Director General of Railroads as a defendant.

—*Palyo v. Northern Pacific Railway Co.* 398.

RAILWAY—Continued.**Accident at Highway Crossing.**

2. At the point of intersection of a highway and defendant's road the railroad track is straight, with no obstructions, so that an approaching train can be seen for a distance of about two thousand feet. The two decedents, sisters, who lived within one mile of the track, were sitting on the rear seat of a Ford automobile which their brother, sitting alone on the front seat, was driving. They were going to a dance on an evening in August. As they approached the crossing the car was slowed down to eight or ten miles an hour, and, as it reached the track, it was struck by defendant's rapidly moving train, the pilot striking its front wheel and radiator, completely demolishing the car, injuring the driver and killing the two sisters. There was testimony sufficient to warrant the jury in finding defendant guilty of negligence. The court submitted to the jury the question whether the sisters were guilty of contributory negligence.

The engineer testified that he first saw the automobile 600 or 700 feet from the crossing; that the train was moving 45 miles an hour; that when he sounded the whistle the motor came within eight or ten feet of the track and stopped, and when the engine was 60 feet from the crossing the car started up and came in contact with the pilot. The brother testified that when within 50 or 60 feet of the crossing he slowed down to eight or ten miles an hour, then took a good, long look, saw and heard nothing, kept on at the same speed and when within five or six feet of the track saw the train right upon him; that his hearing was good and he heard no signal, that it was moonlight and the headlight was dim; that his sisters' eyesight and hearing were good and they said nothing to him about the crossing or danger. Held:

- (1) While the negligence of the driver of a vehicle is not imputed to a passenger riding therein, still the passenger is required to exercise reasonable care for her own safety.
- (2) Evidence in this case held sufficient to justify the submission of the question of contributory negligence to the jury.

—*Praught v. Great Northern Railway Co.* 309.

3. In its charge to the jury, the court said: "Even passengers in an automobile approaching a railroad crossing cannot sit like dumb beasts and pay no attention to their own safety or the conditions and circumstances surrounding them." Held: Such inadvertent language may have created an adverse impression on the

RAILWAY—Continued.

minds of the jury, resulting in a verdict affirming contributory negligence on the part of decedents.

—*Praught v. Great Northern Railway Co.* 312, 313.

4. Action for injury to plaintiff's automobile at a street crossing. Evidence that on a very dark night defendant backed its engine over the crossing with neither light nor lookout on the tender, and that buildings and the engine and tender may have obstructed plaintiff's view so that he could not see the rays of light from the headlight or the lights in the cab and hood of the engine. **Held:** The evidence of defendant's negligence was ample and that of plaintiff's contributory negligence was a question for the jury.

—*De Vriendt v. Chicago Great Western Railroad Co.* 467.

5. Objectionable clauses in the charge to the jury were cured by later portions of the charge.

—*De Vriendt v. Chicago Great Western Railroad Co.* 468.

Fencing Statute Inapplicable to Tracks in Street.

6. A six-year old boy got his toes under the wheels of a train which was moved on tracks laid along a public street. The boy and a companion of the same age were standing in the street, when the latter in a spirit of mischief threw the former's cap under the train, and pushed him under when he hesitated to rescue the cap. One of the acts of negligence charged against the company was the failure to comply with the statute requiring its right of way to be fenced. It is held that the court erred in charging the jury that this statute was applicable to the locus in quo, and that the burden was on the company to show that public convenience required the right of way kept open. The statute is not applicable to railway tracks maintained under license from the municipality along a street duly dedicated to public travel, and which has never been vacated, following *Rippe v. Chicago, Milwaukee & St. Paul Ry. Co.* 42 Minn. 34, 43 N. W. 652.

—*Palvo v. Northern Pacific Railway Co.* 398.

7. Defendant company owned all lots except one in one block abutting on the street upon which its tracks were laid. Young children who lived on one side of the railway tracks attended a large public school on the opposite side of the tracks, and crossed them not at a street crossing but between two street crossings. The trainmen knew that school children were apt to come in numbers across defendant's premises and across the tracks about the time school was let out. **Held:** Whether the train crew took proper precau-

RAILWAY—Continued.

tions to prevent harm to these children was a question for the jury.

—Palyo v. Northern Pacific Railway Co. 402.

8. The defendants were not entitled to judgment notwithstanding the verdict.

—Palyo v. Northern Pacific Railway Co. 399.

Origin of Fire.

9. Plaintiff's dwelling house was on the west side of defendant's right of way and some 50 feet distant. It was a frame structure, and the sides and roof were covered with iron sheeting. On the northeast corner of the building was an inclosure without a roof, inside of which the walls were covered with tar paper. On the morning of the fire, the wind was from the northwest, the ground was covered with snow and the temperature was 20 degrees below zero. Plaintiff arose early, started a fire in the kitchen stove and in a heater in another room, and left the house to catch defendant's train for St. Paul which left at 7:30 a. m. His wife and children were then asleep. When the train passed the house he noticed nothing to indicate that a fire was within. In less than ten minutes the house was discovered on fire by the neighbors and the fire had gained such headway that entrance to the building was prevented.

Action against defendant for damages caused by fire negligently started by it and its engineer. There was no evidence that sparks escaped or were scattered by defendant's train, other than that the engine was working hard and emitting volumes of black smoke in going upgrade. A heavy through passenger train of another railroad passed over the same track two or three minutes preceding defendant's train, and necessarily the engine emitted a similar volume of black smoke and possibly sparks or cinders. The testimony of neighbors who were at the house within 15 minutes after plaintiff left it, justify the inference that the fire started from within the house and not from the inclosure mentioned. Verdict directed for defendant. Held:

- (1) Where the evidence as to the origin of a fire alleged to have been negligently started points with substantially the same force to two or more independent sources, a jury should not be permitted to speculate as to which was in fact responsible.
- (2) The evidence is held insufficient to require a submission of the question to the jury in this case.

—Lares v. Chicago, Burlington & Quincy Railroad Co. 170.

RECEIVER.

Appointment of Receiver of Corporation when Parties in Charge of It Misapply Its Assets. See Corporation, 4.

Of Foreign Corporation. Failure of Trial Court to Limit His Authority. See Appeal and Error, 24.

RECORD.

Delivery of Deed to Agent or Stranger for Record. See Deed, 2.

REFORMATION OF INSTRUMENT. See Abatement and Revival.

Policy of Fire Insurance. See Insurance, 3, 4.

REPLEVIN.

1. Defendant was not entitled to judgment on the pleadings. The general allegations of ownership and right of immediate possession in the complaint were sufficient until met with the answer that the defendant was a bona fide holder, and then the reply could properly join issue on that point.

—Wade v. National Bank of Commerce, 188.

2. A description of the property in a replevin action is sufficient if therefrom the officer may identify the property to be seized and defendant the property involved so that a proper defense may be made.

—Wade v. National Bank of Commerce, 188.

3. A sheriff, or his deputy, in serving a summons or attempting to take property in replevin proceedings in a county of which he is not an officer, acts in an individual and not an official capacity.

—Daigle v. Summit Mercantile Co. 178.

RESERVATION. See Deed, 4, 5.

In Timber Deed. See Log and Logging, 1-3.

SALE.

Condition. See Sale, 5.

Conditional Sale Contract. See Fixture, 6, 7.

1. A sale is presumed to be for cash, in the absence of evidence indicating that credit is to be given.

—Dalrymple v. Randall, Gee & Mitchell Co. 27.

Time of Delivery.

2. Defendants gave plaintiff an order for a large quantity of lumber at specified prices to be shipped from Pacific Coast points to Minneapolis. Plaintiff accepted the order and began shipments. Plaintiff knew the order was given for the purpose of stocking a retail lumber yard in Minneapolis operated by defendant. The contract contained no provision for delivery in instalments or for payment

SALE—Continued.

in instalments, but the parties treated each carload as an instalment, the price of which was due 60 days from date of invoice. Defendants complained that plaintiff's failure to deliver was a breach of the contract. Plaintiffs claimed defendants were in default for nonpayment of instalments of price due. No question was raised of defendants' responsibility and plaintiff at all times had the lumber on hand. Action for the unpaid balance of \$2,500. Defendants admitted that the amount was due and set up a counterclaim for \$300. At the trial the court withdrew the counterclaim from the jury and instructed them defendants were not entitled to any offset. Held:

(1) The rule that failure of the buyer to make instalment payments when due relieves the seller from making further instalment deliveries does not apply where the seller was in default in making delivery when the payment became due and the price of the goods had advanced and the buyer withheld only enough to protect him from loss.

(2) Where no time for delivery is fixed the seller must make delivery within a reasonable time.

—North Coast Lumber Co. v. Great Northern Lumber Co. 304.

3. The court erred in ruling as a matter of law that plaintiff was released from its obligation to make further delivery by defendants' refusal to pay an instalment when it became due, as the evidence made a question for the jury as to whether defendants were justified in withholding this payment on the ground of an alleged prior breach of the contract by plaintiff.

—North Coast Lumber Co. v. Great Northern Lumber Co. 304.

4. Plaintiff claimed the government had taken over the operation of the railroads, and it was difficult to obtain cars, and that the shipments were made as rapidly as possible. Defendants presented evidence that it was not difficult to obtain cars for lumber shipments at that time. Held: The evidence made a question for the jury whether plaintiff was not already in default in failing to make delivery when defendants defaulted in making payments.

—North Coast Lumber Co. v. Great Northern Lumber Co. 305.

Payment and Delivery Concurrent Acts.

Delivery of Grain on Track Sold in Carload Lots on Chamber of Commerce for Cash Conditional on Payment. See Exchange, 2.

5. Where a sale is for cash, payment and delivery are concurrent and mutually dependent acts, and if the vendor makes delivery in ex-

SALE—Continued.

pectation of immediate payment, such delivery is conditional only and he may reclaim his goods if payment be not made.

—Dalrymple v. Randall, Gee & Mitchell Co. 27.

SCHOOL AND SCHOOL DISTRICT.

1. School districts are governmental agencies wholly under the control of the legislature, to perform the public duty of educating the children of the state, and G. S. 1913, § 1286, does not infringe any rights secured by the Constitution.

—Kramer v. County of Renville, 195.

2. Upon a consideration of the evidence presented in an appeal to the district court from an order of the county board detaching a portion of the territory of a consolidated school district and creating therefrom a common school district, it is held not to sustain a finding that the action of the county board was arbitrary, oppressive, and in disregard of the best interests of the territory affected.

—Consolidated School District No. 24 of Cottonwood County v. Stark, 431.

State Aid.

3. The fact that respondent consolidated school district can no longer receive state aid is entitled to consideration, but it is not alone sufficient to sustain the holding of the trial court that the order of county board creating a common school district should be reversed.

—Consolidated School District No. 24 of Cottonwood County v. Stark, 433.

Apportionment of Debt of Consolidated District when Territory is Detached.

4. The county board detached from a consolidated school district certain territory and formed it into a common school district. Before that action the consolidated district issued and sold certain bonds which were deposited in a bank to await the termination of the litigation over the creation of the common school district, and to be returned to the school district in case the order of the county board should be upheld. Held: The failure of the court to apportion the indebtedness of the consolidated district between it and the common school district is of no consequence. The bonds need not be delivered to the purchaser, but may be recalled. If they are not recalled and were lawfully issued, notwithstanding the changed boundary lines, all property within the

SCHOOL AND SCHOOL DISTRICT—Continued.

original consolidated district will continue to be liable for taxes to pay the bonds. G. S. 1913, §§ 1877, 2677.

—Consolidated School District No. 24 of Cottonwood County v. Stark, 433.

5. The proviso, added as an amendment to section 1286, R. L. 1905, authorizes the board of county commissioners to attach the territory of an adjoining school district to a school district having a borough, village or city of not more than 7,000 inhabitants wholly or partly within its boundaries on the petition of a majority of the legal voters of the latter district if it deems such annexation "conducive to the good of the inhabitants of the territory affected."

—Kramer v. County v. Renville, 195.

Removal of Teacher by Appointing Officer Not Reviewable by Mandamus. See *Mandamus*, 3.

Removal of Teacher under Home Rule Charter of St. Paul. See *Municipal Corporation*, 3.

6. The charter of St. Paul having prescribed the procedure for making removals without providing for a trial, relator was not entitled to a trial.

—State ex rel. v. Wunderlich, 468.

7. A municipal body or official, having power to appoint an officer or subordinate, has power to remove such appointee in the absence of any law restricting that power.

—State ex rel. v. Wunderlich, 368, 370.

8. Where an appointee can be removed only for cause he is entitled to a hearing and an opportunity to refute the charges against him unless the law prescribes a different procedure for making such removals.

—State ex rel. v. Wunderlich, 368.

9. Where the law authorizes an officer to remove an appointee if in his judgment a cause for such removal exists and prescribes the procedure which he shall follow in making the removal, the only questions open to examination by the courts are whether the prescribed procedure has been followed and whether the reasons assigned for the removal are sufficient to justify it.

—State ex rel. v. Wunderlich, 368.

SET-OFF AND COUNTERCLAIM. See *Account Stated*, 2; *Sale*, 2.

The offer of grain by a tenant in satisfaction of his liability to his landlord, not having been accepted, was not binding, and plaintiff having brought suit on several claims including such liability, defend-

SET-OFF AND COUNTERCLAIM—Continued.

ant is entitled to have the value of the grain offset against whatever amount is due plaintiff.

—Brekken v. Wenzel, 218.

SIGNATURE.

To Lien Statement. See Mechanic's Lien, 2.

SOLDIERS BONUS ACT. See Bounty, 1-4.**SPECIFIC PERFORMANCE.**

Not Prevented by Misunderstanding of Legal Effect of Contract.

1. If a contract was actually concluded, a misunderstanding by either party of its legal effect will not prevent specific performance, provided its terms are the same as they were designed to be, and were those to which the minds of the parties consented as the result of their negotiations.

—Baker v. Polydisky, 72.

In Accordance with Defendant's Intent.

2. Although specific performance of a contract, according to its terms, be denied because of a mistake of the defendant, the plaintiff should have the right, at his election, to apply to the trial court for a modification of the judgment so as to grant specific performance as it was intended by defendant.

—Baker v. Polydisky, 73.

3. Defendants, the owners, for one dollar executed an option prepared by plaintiff, giving him the right to buy certain land at the price of \$2,800. There were two mortgages on the land, one for \$600, the other for \$120. In fixing the price defendants intended the plaintiff should take the title subject to the mortgages. They lacked experience in business affairs and did not know they must furnish a marketable title under the terms of the option. He did not learn of the mortgages until nine months afterward and supposed he would get a clear title for \$2,800. Thereafter he mailed to defendants a warranty deed running from them to him for \$2,800, and stated that when the deed was executed and deposited at any bank, the payment would be made. Defendants inserted a clause whereby the conveyance was made subject to the mortgage of \$600 and interest, which the grantee was to assume and pay, executed and deposited the deed and left it with a Minneapolis bank for delivery on payment of \$2,800. Plaintiff deposited \$2,800 in the bank to be paid to defendants upon satisfaction of the mortgages and the execution of a new deed. He had resold the land through an agent for \$4,160, less incumbrances. Upon failure of defendants

SPECIFIC PERFORMANCE—Continued.

to execute such deed, he deposited the \$2,800 in court and brought this action for specific performance. There was no settled case or bill of exceptions. Held:

(1) If the minds of both parties to a contract meet upon its terms, and those terms are free from ambiguity, in the absence of fraud or misrepresentation, a mistake of one of the parties alone, resting wholly in his own mind, though not ground for rescission, may be good ground for refusing specific performance. Within this principle the trial court was justified in refusing specific performance of an agreement giving to one of the parties an option to buy land.

(2) The facts in this case are different from the facts in *Caldwell v. Depew*, 40 Minn. 528, 42 N. W. 479, and do not charge defendants with negligence, which was the sole cause of their mistake.

(3) The complaint and findings do not afford a sufficient basis for a judgment for damages.

—*Baker v. Polydisky*, 72, 73.

When Doubt as to Existence of Contract.

4. Specific performance is not of absolute right, but rests in judicial discretion, to be exercised according to settled principles of equity. It should not be granted if it is doubtful whether the contract sought to be enforced was actually made. There must have been a clear accession on both sides to one and the same set of terms.

—*Baker v. Polydisky*, 72.

STATE. See *Municipal Corporation*, 17.

Public Debt for Military Purpose. See *Constitution*, 2.

STATE PROHIBITION ACT. See *Intoxicating Liquor*, 3-11.

STATUTE.

Statute Contingent on Act of Congress Not Unconstitutional as Delegation of Legislative Power to Congress. See *Constitution*, 3.

What Constitutes a Claim within Meaning of Section 7323, G. S. 1913, for Presentation and Allowance of Claims against Estates of Decedents. See *Executor and Administrator*, 1.

Speed Law, § 2635, G. S. 1913, Not Void for Indefiniteness. See *Criminal Law*, 21.

Repeal or Modification of G. S. 1913, § 7059, Not Intended by Enactment of G. S. 1913, § 3858. See *Assignment*, 1.

1. The legislature, having the general power of enacting laws, may enact them in its own way and give them such effect as it chooses.

STATUTE—Continued.

It may provide that a law may go into effect at one time or another, absolutely or on condition, and, if the act is complete in itself, it is within the scope of the legislative power to prescribe that it shall become operative only on the happening of some specific contingency.

—State v. Brothers, 339.

Subject of Act. See Intoxicating Liquor, 4.

Title of Act.

2. The subject of Laws 1915, c. 128 (G. S. Supp. 1917, §§ 1639—10 to 1639—16), relating to restricted residence districts in cities of the first class, for the establishment of which condemnation is provided, is sufficiently expressed in its title, within the constitutional requirement, though the subject of condemnation is not mentioned in it.

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STAY. See Army and Navy.

STREET RAILWAY. See Municipal Corporation, 2.

1. The proposed franchise considered, and held not to surrender by its

STREET RAILWAY—Continued.

provisions the old car company franchise, and the obligations incurred thereunder.

—Meyers v. Knott, 200.

2. The proposed franchise considered, and held, to provide for ample consideration moving to the city for the franchise and rights thereby granted to the car company, to answer the requirements of chapter 124, General Laws 1915.

—Meyers v. Knott, 200.

3. Such franchise provides for the regulation of the affairs of the car company by the city council, and does not nullify the same by subsequent provisions.

—Meyers v. Knott, 200.

4. The calling of a special election by the city council, to be conducted in all respects as required by the general election laws of the state, for the submission of a franchise ordinance to the voters of the city for ratification, to be held not less than 90 days after the filing of the acceptance of the proposed franchise by the car company, is a sufficient compliance with the provisions of chapter 124, Laws of 1915.

—Meyers v. Knott, 200.

5. A franchise ordinance, adopted under the provisions of chapter 124, Laws 1915, by a majority vote of the city council, need not be submitted to the mayor of the city for his approval.

—Meyers v. Knott, 199.

6. One of defendant's street cars going north passed plaintiff and he then turned his motor to the west and started to cross defendant's street car tracks when he was struck by a car going south, and injured. At the close of the case the court dismissed the case. Held: No error.

—Schrankel v. Minneapolis Street Railway Co. 465.

TAXATION.**For Public Purpose.**

To justify a court in declaring a tax invalid, on the ground that it was not imposed for the benefit of the public, the absence of a public interest in the purpose for which the money is raised by taxation must be so clear and palpable as to be immediately perceptible to every mind.

—Gustafson v. Rhinow, 420.

Payment of Taxes by Persons in Adverse Possession of House and Lot.

See Adverse Possession, 4.

By Grantee in Timber Deed. See Log and Logging, 1, 2.

TAXATION—Continued.

In a Vendor's Action for Breach of Executory Contract for Sale of Land, a Claim for Taxes Paid by the Vendor Should Be Specially Pleaded. See Vendor and Purchaser, 3.

TELEGRAPH AND TELEPHONE.

Omission of Bank Cashier to Continue Inquiry by Telephone when Asking about Validity of Plaintiff's Promissory Note. See Insurance, 20.

TENANT IN COMMON. See Adverse Possession, 2.

Possession of One Owner in Common Presumed Not to Be Hostile. See Adverse Possession, 2.

TIME.

Of Delivery of Goods Bought Must Be Reasonable, where Time Not Fixed by Seller. See Sale, 2(2).

TIME CHECK.

Indorsement in Blank of Check Issued by Contractor to Laborer. See Assignment, 2.

TIMBER DEED. See Log and Logging, 1-3.**TORT.**

Husband Liable for Tort of Wife when Acting as His Agent. See Husband and Wife, 1.

TRADE-MARK AND TRADE-NAME.

1. In determining the question of unfair competition, regard may be had to the fact that the commodity handled by the parties obtains no prestige from the name of the dealer or manufacturer.

—Thompson Lumber Co. v. Thompson Yards, Inc. 298.

2. A person who has acquired a business reputation may, when he participates in organizing a corporation to take over that business, lawfully permit his name to become a part of the corporate name, provided it is not so similar to that of an existing corporation that the necessary result is loss to the latter, or the selection of the name is with a view to deceive.

—Thompson Lumber Co. v. Thompson Yards, Inc. 298.

3. There is sufficient dissimilarity in appearance and sound between the names Thompson Lumber Company and Thompson Yards, Inc. to prevent any claim that G. S. 1913, § 6147, prevented defendant from adopting its name.

—Thompson Lumber Co. v. Thompson Yards, Inc. 300.

4. Thompson Lumber Company and Thompson Yards, Inc. are not so similar in appearance that the mere selection of defendant's name

TRADE-MARK AND TRADE-NAME—Continued.

should in and of itself be held to work a fraud upon plaintiff, or be considered as naturally tending to wrongfully divert plaintiff's trade to defendant.

—Thompson Lumber Co. v. Thompson Yards, Inc. 301.

Unfair Competition—Similar Names.

5. In this action to enjoin defendant from using its corporate name in its business in the vicinity where plaintiff was engaged in a like business on the ground of unfair competition, it was conceded that defendant neither intended nor attempted to actively mislead the public, but it was contended that, nevertheless, the natural result of the use of defendant's name was to create confusion and a wrongful diversion of plaintiff's business to defendant. It is held:
 - (1) The names of the two corporations are not so similar in appearance that it may be held, as a matter of law, that the mere selection and use by defendant of its name tends to work a fraud upon plaintiff or constitutes unfair competition.
 - (2) The findings of fact to the effect that the use by defendant of its name, in doing business in the vicinity of plaintiff neither has caused loss to the latter nor is likely to wrongfully divert its business, and that defendant has not attempted to mislead the public, are sustained by the evidence.

—Thompson Lumber Co. v. Thompson Yards, Inc. 298.

TRIAL.

When Supreme Court May Determine Question Not Passed on by Trial Court. See Appeal and Error, 17.

Call of Calendar.

Setting Case for Trial as Court or Jury Case. See Appeal and Error, 15.
Objections to Questions Sustained.

1. Two questions were asked calling for conclusions; and one was asked as to which it was at least doubtful whether the witness was qualified to testify. No foundation was laid. No offers were made to show what the proofs would be. There was no error in sustaining objections to the questions.

—Licensed Retail Liquor Dealers Association of Minneapolis v. Denton, 81.

Refusal to Strike Out Answer to Question. See Appeal and Error, 22.

2. Certain letters on immaterial subjects were properly admitted for the sole purpose of fixing a date.

—James E. Carlson, Inc. v. Babler, 126.

Question for Jury. See Insurance, 15; Negligence, 2; Principal and Agent, 4; Railway, 4, 7; Sale, 3, 4. Work and Labor, 4.

TRIAL—Continued.

Charge to Jury. See Appeal and Error, 23; Assault and Battery; Fraud, 3, 4; Garage Keeper, 4; Municipal Corporation, 9, 10; Railway, 3, 5, 6.

3. When the charge was given, there was no exception taken to any part of it. The only way in which the court's instruction could thereafter be questioned would be by a motion for a new trial under G. S. 1913, § 7830.

—State Bank of Reading v. Ronan, 237.

Effect of Failure to Instruct on a Particular Phase Presented by the Evidence. See Appeal and Error, 9.

Refusal to Instruct Jury. See Criminal Law, 7, 23. Election, 2.

Effect of Failure to Insert in Settled Case What Passed between Court and Counsel. See Appeal and Error, 12.

Special Findings of Jury.

4. Special findings made by a jury upon questions of fact submitted to them are not simply advisory, but are as binding on the court as a general verdict. Where findings made by the court are inconsistent with those made by the jury, they cannot be sustained.

—Nienow v. Village of Mapleton, 60, 64.

Verdict.

Setting Aside Verdict on Appeal upon Grounds Not Made by Parties Part of Their Case. See Appeal and Error, 28.

Effect of Failure of Codefendant to Ask for Separate Verdict. See Appeal and Error, 7.

Findings of Fact.

When Inconsistent with Special Findings of Jury. See Trial, 4.

Findings of Court.

Memorandum by the Trial Judge May Be Considered in Interpreting the Decision. See Appeal and Error, 18.

TRUST.

Attempted Bequest in Trust Invalid. See Will, 10.

VALUE.

Competency of Witness to Testify to Value. See Evidence, 5.

Finding as to Value of Farm Sustained by Evidence. See Exchange of Property, 2.

Of Grain Tendered by Debtor to His Creditor May Be Set Off against Debtor's Liability. See Set-Off and Counterclaim.

VARIANCE. See Pleading, 8.

VENDOR AND PURCHASER.

Option to Buy Land. See Specific Performance, 3.

Purchase Money Lien.

1. The plaintiffs gave a contract of sale of certain lands and the grantees assigned to the defendant Mudbaden Company. The contract provided that when the purchase price was reduced by payments to \$18,000 a deed should be executed by the grantors and notes for \$18,000 should be given by the grantees; and that the grantees until the payment of the purchase price should suffer no lien to attach, should pay all taxes, and should keep up insurance, the proceeds of which, in case of loss, should be used in rebuilding or should be paid to the grantors. The plaintiffs gave a deed to the Mudbaden Company, pursuant to this contract, which recited that it was subject to all its terms and conditions, the company gave its notes, and afterwards mortgaged to the defendant trust company. It is held that the contract reserved a lien for the purchase price which survived the giving of the deed and is superior to the mortgage to the trust company.

—Rosendahl v. Mudbaden Sulphur Springs Co. 361.

Vendor's Action for Breach of Sale Contract.

2. In an action for the breach of an executory contract for the sale of land, brought by the vendor against the vendees, there was evidence that after defendants' failure to perform, plaintiff sold and conveyed the property to third persons. Held: The evidence supported the findings of the trial court to the effect that plaintiff suffered no loss or damage by the refusal of defendants to perform the contract.

—Howe v. Gray, 122.

3. The general rule of damages in such an action is the difference between the value of the land and the contract price. A claim for interest on the purchase price, and for taxes paid by the vendor, are special in character and should, if recoverable at all, be specially pleaded.

—Howe v. Gray, 123.

4. The particular claims are, however, presumptively included in the general finding that plaintiff suffered no damage by defendants' failure to perform.

—Howe v. Gray, 123.

VENUE.

Of Real Action.

1. If the subject matter of an action is land, and the principal relief

VENUE—Continued.

sought relates to the land, the action must be brought and tried in the county where the land is situated.

—*Delasca v. Grimes*, 67.

Change of Venue.

Objectionable Practice. See *Appeal and Error*, 16.

Right to Change Waived by Defendant.

2. When the venue does not go to the jurisdiction of the court over the subject matter of the action, a party may waive his right to a trial in a particular county, and such waiver may be implied. By going to trial without objection in a county in a judicial district to which the case was remanded by the district court of another judicial district, and by failing to ask or obtain a ruling by the trial court on the question of whether the action was properly triable in such county, a defendant waives his right to assert that he was entitled to a trial in the county where he resides and that the order remanding the case to the county where it was tried was erroneous.

—*Delasca v. Grimes*, 67.

3. By answering in an action in replevin without objecting to the venue and asking affirmative relief, and by stipulating to a transfer of the property involved, during the pendency of the suit, to the custody of a party in the county where the action was instituted, a defendant is precluded from raising the question whether the suit can be maintained in any other county than the one wherein the property was located when the action was begun.

—*Wade v. National Bank of Commerce*, 187.

VILLAGE.

Ordinance Prohibiting Parking Automobile within 20 feet of Hydrant.

See *Municipal Corporation*, 1.

Violation of Village Ordinance. See *Malicious Prosecution*, 4.

WAR PROHIBITION ACT. See *Intoxicating Liquor*, 5-7.

WARRANT OF ARREST.

Not Necessary where New Charge Is Preferred against Person in Custody for Trial on Criminal Charge. See *Criminal Law*, 1.

The only function of the warrant in a criminal case is to enable the court to acquire jurisdiction of the person of the defendant by bringing him before the court to answer the charge made against him.

—*State v. Volk*, 225.

WILL.

Interlineation. See Will, 7.

Where Will Fails in Part to Carry Out Testator's Intention.

1. If a testator comprehends and approves the instrument as written, it should not be refused probate because it fails to carry out the intention of the testator as to part of his property.

—Benrud v. Anderson, 111.

Where Testator's Instructions Are in One Language and Will in Another.

2. Where a will has been drawn in the English language, but all the directions as to its preparation have been given by the testator in another tongue, it may nevertheless be found to be his last will and testament, if, prior to its execution, a substantially accurate translation or explanation of its provisions is given the testator, so that he understands their meaning. It is not necessary that he should correctly appreciate their legal effect.

—Benrud v. Anderson, 111.

3. It is not indispensable to the validity of a will that it should be couched either in the words of the testator or in the tongue in which he gives the directions to the one who drafts the instrument.

—Benrud v. Anderson, 117.

Admissions by One of Several Legatees Named in Will Tending to Cast Doubt on the Instrument Presented to Probate, Are Not Admissible, When. See Evidence, 2.

Attesting Witness Competent to Prove Will.

4. Since section 7254, G. S. 1913, annuls the interest of a devisee or legatee in a will where he is an attesting witness thereto and there is but one other attesting witness, such devisee or legatee is a competent witness to prove the will.

—Benrud v. Anderson, 111.

5. What matter is contained in a will is for determination when the instrument is being considered at the hearing for proving the will. What construction is to be placed thereon is for later consideration.

—Bogart v. Taylor, 458.

6. It frequently happens that courts construe the dispositions of a will, even when drawn by experienced lawyers, contrary to what the testator thought he had made. Because a will may or even must be construed as to some provision differently from what a testator intended, is no reason why it should be refused probate.

—Benrud v. Anderson, 118.

WILL—Continued.**Probate of Will Conclusive.**

7. The residuary clause in a typewritten will had an interlineation of four names in pencil in the handwriting of the testatrix. The will was presented and admitted to probate without objection or appeal. On the application for a decree of distribution of the residue of the estate, objection was made that the persons whose names were interlined should be excluded as residuary legatees and objectors were entitled to show that the names were written after the execution of the will, without attestation. **Held:** Section 7270, G. S. 1913, is explicit that objection to the validity of the will shall be made before the time for proving the will, and a decree of the probate court establishing a will, unless reversed on appeal, is conclusive that the instrument was duly executed by the person whose will it purports to be, and that such person had legal capacity to execute it.

—Bogart v. Taylor, 454.

8. The court will have regard for the common desire of men to favor with their bounty their own kin.

—Heffelfinger v. Appleton, 213.

Construction of Residuary Clause.

9. A will gave certain legacies and created several trusts directing the deposit of funds in trust, the income to be paid to beneficiaries for life. On the death of each legatee, the funds deposited for his benefit were to become part of the residuary estate. The will directed that the balance of the estate be transferred to a corporation to be formed. The residuary estate, made up mostly of the returned deposits, the will gave to the wife and children of the testator and provided: "That if either of my children shall die without leaving a child or children, then the share of such child shall become the property of the survivors, it being my intention that the surviving child, in case the others die without leaving a living child or children, shall have the whole balance of my estate." The executors, having in their possession a substantial sum of money, petitioned the probate court for an order making a partial distribution, and asking a construction of that clause of the will. The court construed the will and ordered the distribution. **Held:**
- (1) The probate court had jurisdiction to construe the will for the purpose of determining to whom distribution should be made. Regular proceeding demands the entry of a decree of distribution by the probate court. That court alone can discharge the executor and determine the devolution of title to the property of the

WILL—Continued.

estate. If the executor has transferred property in anticipation of a proper decree, such decree may subsequently be made.

(2) The clause of the will above quoted, construed in connection with the balance of the will, means that, upon the death of one of the testator's children without issue, the others shall take his share, whether such death occur before or after the death of testator.

—Heffelfinger v. Appleton, 208.

10. Testatrix by her will bequeathed to a person named therein the sum of \$4,000, to be used by him for the extension of the Kingdom of God in a certain church. Held, that the bequest was not an absolute gift to the person named, but was an attempted bequest in trust for the purpose stated in the will, and invalid because the beneficiaries are not certain or capable of being made certain.

—Bogart v. Taylor, 454.

Reimbursement of Executor for Expenses of Litigation in Unsuccessful Effort to Sustain Will. See Executor and Administrator, 2.

WITNESS.

Absence of Witness without Explanation. See Bills and Notes, 4.

Indorsement of Names of Witnesses on Indictment. See Criminal Law, 9, 10.

Attempt to Bribe Witness to Leave the State and Not Appear before Grand Jury. See Contempt, 2.

When Attesting Witness to Will and Devisee Competent to Prove Its Execution. See Will, 4.

Cross-Examination of Defendant before Payment of Witness Fee.

1. No reversible error may be predicated on the fact that defendant was called for cross-examination without being tendered witness fees, or that plaintiff's whole case rested on the testimony so obtained.

—Boyea v. Besch, 254.

Cross-Examination.

2. The extent to which the cross-examination of a witness upon collateral matters to affect his credibility may be pursued is largely discretionary; but in this case where the county attorney conducted a prolonged cross-examination of the defendant which carried insinuations as to the character and disposition of the defendant which were likely to be applied by the jury unfavorably to him in considering the particular issue and not confined to its proper scope, it was prejudicial and a new trial should be had.

—State v. Taylor, 377.

WITNESS—Continued.**Cross-Examination of Legatee for Impeachment.**

3. The contestants may not call the legatee, who has made admissions tending to cast doubt on the instrument presented for probate, for cross-examination under the statute, to lay the foundation for impeachment, and thus indirectly introduce that which is inadmissible directly.

—Benrud v. Anderson, 111.

Privilege.

Witness Not Compelled to Incriminate Himself. See Contempt, 5.

Privileged Communication to Attorney. See Evidence, 7.

Privileged Communication to Physician.

4. The rule that a witness cannot testify to what he learned from a patient while acting as the patient's physician, applies without reference to whether the services are gratuitous or paid for. So applied where the physician was son-in-law of the patient.

—Hallenberg v. Hallenberg, 43.

Corroboration.

Of Mother Unnecessary in Proceeding to Determine Paternity of Her Child. See Bastard.

Of Testimony of Accomplice. See Criminal Law, 6.

WORDS AND PHRASES.

Use of Terms Which Change in Definition. See Constitution, 1.

Words Used in Contract for Future Support. See Contract, 4.

Language of Reservation in Deed Construed According to Intention of Parties. See Deed, 4.

Language of Deed Cannot Be Restricted because Rights of Property Included in Its Language Were Not in Minds of Parties to It. See Deed, 6.

Validity of Will When Not Written in Words of Testator Nor in the Language Spoken by Him. See Will, 2, 3.

What Constitutes a Claim for Presentation and Allowance against Estate of Deceased Person. See Executor and Administrator, 1.

An Accessory after the Fact Not an Accomplice. See Criminal Law, 5.

Ambiguity. See Deed, 5.

Blanket Insurance Policies. See Insurance, 10.

Words "For Sale" in State Prohibition Act. See Intoxicating Liquor, 11.

Probable Cause Defined. See Malicious Prosecution, 1.

Public Use Not Defined in Constitution of Minnesota. See Eminent Domain, 1.

WORDS AND PHRASES.

Term Public Use Is Flexible and Cannot Be Limited to Public Use Known at Time of Adoption of Constitution. See *Eminent Domain*, 2.

"Situated," as Used in Fire Insurance Policies. See *Insurance*, 9.

The word "yard" does not necessarily denote a lumber yard, since we have coal yards, wood yards, brick yards and other yards not devoted to the lumber business.

—*Thompson Lumber Co. v. Thompson Yards, Inc.* 300, 301.

WORK AND LABOR. See *Log and Logging*, 5, 6; *Master and Servant*, 1.

1. Defendant erected a dwelling house from plans and specifications prepared by plaintiff and paid \$700 in full therefor. Defendant sold this house and, wishing to erect another, borrowed from plaintiff the original drawings and had new blue prints made therefrom, which he used in constructing a new house. Plaintiff sued for the value of the use of the plans and specifications. The court made findings that plaintiff was the owner of the plans and defendant procured them for use in constructing the second house under an agreement to pay for them. **Held:** The findings of fact sustain the conclusions of law.

—*McCoy v. Grant*, 92, 93.

2. Even though a copy of the plans and specifications had been filed with the building inspector as required by the building regulations of the city, in order to obtain a permit for the construction of the first house, plaintiff and defendant could contract that as between themselves plaintiff should remain the owner of the plans and specifications and defendant should not use them again without paying therefor.

—*McCoy v. Grant*, 94.

3. Action for architect's fee for preparation of plans and specifications for a residence. Conflicting evidence. Finding in favor of plaintiff. **Held:** The finding was not clearly against the evidence.

—*Kennison v. Lucker*, 469.

4. Action against plaintiff's brother for services as nurse and house-keeper and for money had and received by him for plaintiff's use. The oral testimony of the litigants could not be reconciled, and one or the other necessarily falsified. **Held:** The case was peculiarly one for the jury, and the evidence fairly sustains the verdict for \$1,000.

—*Courtney v. Nagle*, 65, 66.

WORKMEN'S COMPENSATION ACT OF IOWA.

1. To entitle an employer to the benefits and protection of the Work-

WORKMEN'S COMPENSATION ACT OF IOWA—Continued.

men's Compensation Act of the state of Iowa, he must comply with the insurance provisions thereof and insure the liability thereby created within the time therein provided, a failure to do which will expose him to liability to the same extent as before the compensation law was enacted.

—Nash v. Minneapolis & St. Louis Railroad Co. 322.

2. The insurance provisions of that act took effect and became operative and in force on July 1, 1913.

—Nash v. Minneapolis & St. Louis Railroad Co. 322.

3. An order relieving the employer from the insurance provisions of the act, which is authorized on a showing of solvency and ability to pay, can have no retroactive operation, and does not affect or impair a right of action at law which accrued to an employee or his next of kin prior to the date when the employer became subject to the act.

—Nash v. Minneapolis & St. Louis Railroad Co. 322.

WORKMEN'S COMPENSATION ACT OF MINNESOTA.**Purpose of Act.**

1. The intent and purpose of the Workmen's Compensation Act was to secure to an injured employee compensation to the extent of the disability actually sustained, and the provisions as to payments for specific injuries must yield thereto; when taken together, they create a greater disability.

—State ex rel. v. District Court of Ramsey County, 198.

Negligent Third Party Employer.

2. To entitle a third party employer, whose negligent act causes injury to the employee of another, to the protection of the Workmen's Compensation Act, G. S. 1913, § 8229, subd. 2, it must appear that the act complained of arose out of or had some relation to the business carried on by him, as to which he was an employer within the meaning of the statute. The mere fact that he is an employer of labor is not sufficient

—Podgorski v. Kerwin, 313, 317.

3. Such an employer is not necessarily engaged in the work of his employment or in the conduct of the affairs thereof when going from his residence to his place of business, though he makes use of an automobile owned by him as a means of conveyance.

—Podgorski v. Kerwin, 314.

4. An injured employee may maintain an action against such third party employer notwithstanding a settlement had with his own

WORKMEN'S COMPENSATION ACT OF MINNESOTA—Continued.

employer and the payment of the amount agreed upon. The cause of action is not by such payment transferred to his employer.

—Podgorski v. Kerwin, 314, 318.

5. A recovery in such an action will include his employer, and not expose the third party to a second suit.

—Podgorski v. Kerwin, 314, 318.

Employer's Liability on Benefit Certificate.

6. Plaintiff, while in the employ of one of defendants, was injured by the negligence of a third party. The injury was one for which his employer was liable to make compensation under the compensation act, but plaintiff sued the third party, and recovered in settlement more than the compensation allowed by the compensation act. Plaintiff also held a benefit certificate issued by defendant's benefit department for benefits upon death or disability of an employee in cases in which compensation or damages were not payable by the employer and now sues for benefits under that certificate. Held:

Plaintiff's contract with defendants' benefit department entitled him to benefits in event of death or disability for which compensation or damages are not required by law to be paid by his employer. This being a case in which liability of the employer arose under the compensation act, liability under the benefit certificate does not arise.

—Holmquist v. Curtis Lumber & Mill Work Co. 163.

7. The fact that the payment of damages by the railroad company discharged the liability of the employer does not give rise to liability under the benefit certificate.

—Holmquist v. Curtis Lumber & Mill Work Co. 163.

Accident Arising Out of Employment.

8. The plaintiff was in the employ of a laundry company. He and the laundry company and the defendant were under the Workmen's Compensation Act. He was injured at the noon hour while carrying a pack of laundry on his back from a hotel to the laundry by an auto truck of the defendant. He should have taken this laundry in the morning when out on his route with his wagon, but he forgot it. He brought this action against the defendant on its common law liability. Under the compensation act an employee may bring a common law action against the third party and recover to the extent which he would receive from his employer under the compensation act; and if he proceeds against his employer under the compensation act his employer is subrogated to

WORKMEN'S COMPENSATION ACT OF MINNESOTA—Continued.

his cause of action against the third party to the extent the employer has paid under the compensation act. At the close of the testimony the defendant moved that the case be dismissed as a common law action and that the court award or deny compensation in accordance with the compensation act; and the court, being of the opinion that as a matter of law the injury to the plaintiff arose out of and in the course of his employment, granted the motion. **Held:**

(1) The injury to the plaintiff came from a street risk and as a matter of law arose out of his employment.

(2) The injury to the plaintiff as a matter of law arose in the course of his employment.

(3) By the granting of the motion of the defendant to dismiss the case as a common-law action and to proceed as under the compensation act the defendant's liability to respond to the extent to which the laundry company was liable was determined, and there remained nothing to do except to fix compensation.

—Hansen v. Northwestern Fuel Co. 105.

9. The relator's husband worked for Minneapolis, driving a sprinkler. He furnished his services and the use of his team and the running gears of his wagon for a stated daily compensation. He worked eight hours a day, from 8 in the morning until 5 in the evening with an hour off at noon. He fed and stabled his team at his own expense. One evening, after his day's work was done, he was killed by one of his horses while he was caring for it in his stable. It is held that the accident did not arise out of his employment and that he was not entitled to compensation under the Workmen's Compensation Act.

—State ex rel. v. District Court of Hennepin County, 259.

Permanent Partial Disability.

10. The employee's little finger on the left hand was so seriously injured as to necessitate amputation and in consequence of the injury the usefulness of the hand was destroyed one-half. **Held:** The findings of the trial court that the injuries created a permanent partial disability of plaintiff's hand were sustained by the evidence.

—State ex rel. v. District Court of Ramsey County, 198, 199.

Attorney's Fee.

11. Application by attorney for allowance of his fees for services rendered a disabled workman who received \$231 in all from his em-

WORKMEN'S COMPENSATION ACT OF MINNESOTA—Continued.

ployer, disallowed, because such fees cannot be recovered under the Workmen's Compensation Act.

—Johanson v. Lundin Bros. 470.

WRIT.

Certiorari. See Certiorari.

Habeas Corpus. See Poison.

Mandamus. See Mandamus.

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